THE RENEWAL OF
THE FEDERATION

A
BRITISH COLUMBIA
PERSPECTIVE

by Melvin H. Smith, Q.C.

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A BRITISH COLUMBIA PERSPECTIVE

by Melvin H. Smith, Q.C.

Victoria, B.C.

May, 1991

ABOUT THE AUTHOR

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Preface

In the immediate aftermath of the demise of the Meech Lake Accord, and in the absence of the cataclysmic collapse of the country predicted by so many of the Accord's supporters, an air of defeatism and resignation set in among some observers over the future of the country. One highly regarded central Canadian newspaper columnist described the result of the collapse of Meech as the end of Canada "as we have known it".[1] He went on in sombre tones befitting a funeral eulogy.

The "end of Canada as we have known it" can be viewed in terms of defeat, terminal illness and, ultimately, death or it can be viewed as an opportunity to build a renewed and better country. Another columnist put it this way:

> *"The collapse of the Meech Lake Accord three weeks ago has given Canadians the freedom to abandon the accepted myths about how this nation works. Suddenly everything — our traditions, our self-image, our very concept of nationhood — is open to question.*
>
> *It is unsettling to be so exposed and vulnerable. And yet it can be exhilarating to toss out old orthodoxies. It creates room for candour and creativity and growth."*[2]

Many ordinary Canadians see the collapse of Meech Lake in this light and look forward to the formidable challenge that lies ahead. Particularly is this so in Western Canada.

Canadians and their governments have been provided with an unparalleled opportunity to build a new Canada — one that is more efficient, more competitive in the global context, leaner but not meaner, more decentralized, fairer to the West, less bureaucratic and more democratic — and designed to give to the citizens of Canada the means to achieve their legitimate aspirations in their regional settings and, at the same time, through a fresh assessment, affirm those objectives and ideals that bind us together as Canadians.

I am not unmindful of the seriousness with which the failure of the Meech Lake Accord has been greeted in Quebec or the strong Quebec nationalist currents that increasingly flow in that Province. But these are joined by currents flowing in Western Canada that no longer will be denied. Too long have the West's legitimate demands for constitutional change fallen on deaf ears. There is an emerging feeling throughout the West that it is now *our* turn. Deference to others' demands in the past has given way to defiance and determination to have the West's grievances at last dealt with. One Quebec observer describes it as the West's "quiet anger"[3] and a prominent B.C. publisher as a "revolution" of sorts.[4]

This phenomenon in the West is being buoyed along by its ordinary citizens long frustrated by federal government policies which are perceived often to be inimical to the interests of Western Canada and always tilted to benefit central Canadian interests. This dissatisfaction, which in the past has only led to frustration with and alienation from central Canada and its institutions, is now finding focus and expression through the platform of the Reform Party of Canada.

Repeatedly over the past twenty-five years, the legitimate constitutional aspirations of Western Canada, and those of other provinces other than Quebec, have taken a second place to what has been perceived to be the more pressing constitutional needs of the federal government and the Province of Quebec.

Thus the round of negotiations, which will inevitably take place within the next two years, provides an unparalleled opportunity for British Columbia, and all provinces for that matter, to enter into, with the support of their citizens, bona fide negotiations with one another and the federal government to mold the kind of Canada within which all of its citizens can, in the future, feel they have a full place.

Throughout Canada there will be many articulate spokespersons, task forces, commissions and think tanks, which will put forward their particular visions for a new Canada. This paper is written from an unabashedly British Columbia perspective. I make no apologies for that. But these proposals are not designed solely for the benefit of British Columbia but for the country as a whole. They are pro Canadian in the fullest sense.

This paper is predicated on the continued existence of Canada as a nation united. It has little in it for those whose consideration of these matters contemplate any part of Canada, be it Quebec, the West, or British Columbia, separating from the rest of Canada. While the reality is that separation may be an option, it is not one that is addressed in this paper.

This paper does *not necessarily* reflect the constitutional position of the Province of British Columbia. These are the writer's views put forward after almost twenty-five years of being intimately involved in matters constitutional.

Moreover, this is not *an options* paper but rather a *directions* paper: the difference being that the former would merely set out a range of possibilities without indicating preferences, whereas this paper, while reviewing many of the options on a particular subject, comes down in favour of one over another. It therefore inevitably reflects the experiences and biases of the writer.

It is to be hoped that this paper might assist in providing focus and direction to the Government of British Columbia, the Province's citizens and hopefully all concerned Canadians as we approach the negotiations in which we must, of necessity, soon be engaged.

Melvin H. Smith, Q.C.

I. British Columbia in Confederation

A. Canada's Pacific Region

1. Introduction

The Fathers of Confederation saw their vision of a "Dominion from Sea to Sea" fulfilled on July 20, 1871, when the united Colony of British Columbia joined Canada. It brought with it a vast area of 366,000 square miles (949 000 square kilometres) — ½ the total area of all the other Provinces at the time — and larger than Washington, Oregon, California and New York states combined.

History, geography, and economic factors taken together make our Province unique in many respects from other western provinces, and certainly from the rest of Canada.

The development of our province in terms of population, industry, commerce, and financial institutions did not, historically, come about through trans-continental links with the rest of Canada but rather through strong off-shore connections and the dominance of British oceanic expansion. Our early settlers came by ship via Cape Horn or from the Orient, supplemented by a large influx of Californians in search of gold so that in the mid-1800's British Columbia's small colonial population, apart from its native peoples, was as much American as British.

It is true that the establishment of the trans-continental railway in 1886 provided us with an overland connection with the rest of Canada. Although the railway proved to be the means for populating the Prairie region it did not have that great an effect in settling British Columbia.

To a greater degree than any other region of Canada, our trade is more with the rest of the world than with other Canadians. Since the days of the great Empress ships to the present grain ships, lumber and coal carriers, our trade patterns have been to the outside world and latterly more particularly to the Pacific Rim countries.

2. Size and Significance

British Columbia is by far the largest province west of Ontario, comprising approximately 15.5% of the area now covered by all provinces. Similarly, ours is Western Canada's most populous province with over 3.1 million people. This represents nearly 41% of the population of the four western provinces and nearly 12% of the Canadian total.

Vancouver has become a principal Canadian financial, shipping and manufacturing centre, having the largest urban population in the Province and the third largest in Canada with a metropolitan area population of more than 1.6 million in 1990. Victoria, the capital of the Province, has a metropolitan area population of over 280,000.

British Columbia's population is growing at almost twice the rate of the national average and this trend is expected to continue over the next several decades. The Province could increase its population to 4.7 million and its share of the Canadian population to nearly 14.5% by the year 2016.[5]

3. Geography and Economic Base

a. Geographic Factors

Geography has been a fundamental factor in determining the pattern of the social and economic development of British Columbia. It has determined the nature of peoples' livelihood, where they will settle and live, the nature and extent of interaction between the region's communities, and the kind of connections with the rest of Canada and the world.

In British Columbia the two most influential geographic factors are its mountainous terrain and its maritime position on the Pacific rim. In addition to the Rocky Mountains, the region includes the Coastal Range, the Cascades, and the Hazelton Mountains. Early explorers quite naturally described British Columbia as a "sea of mountains."

While the mountains formed a major barrier to overland access in the exploration of British Columbia, the 7 000 kilometres of coastline along the Pacific Ocean provided numerous fiord-like inlets as potential harbours for early exploration and development.

The mountains and the sea, then, were major factors behind the economic and social development of the Province resulting in offshore connections rather than trans-continental links with the rest of Canada. They also help to explain the traditional sense of isolation between British Columbia and the rest of the country.

Physiographic factors also conditioned the kinds of activities early settlers could hope to undertake and, therefore, affected the demography of the Province. For example, British settlers were attracted to mining, fishing, shipping, dockwork, and trading — occupations with which they were familiar. Climatic factors also contributed to the early settlement of the Province by attracting to coastal areas British immigrants accustomed to similar conditions.

Transportation and communications patterns also reflect geographic factors. The natural communications linkages follow the linear land forms running north-south. Early attempts at establishing west-east linkages were either futile, very costly, or both. Although technology has partially overcome geographic barriers, it is the natural north-south linkages which still dominate some modes of transport. Specifically, even today there are only 5 main highways from British Columbia into Alberta compared to 14 from British Columbia into the United States. It is not surprising, therefore, that British Columbians tend to be more prone to travel to the United States than to the rest of Canada.

Distance from central Canada, with the inherent difference of 3 time zones, makes the conduct of business, commercial and governmental affairs more difficult. At almost any time of the day one or other of the parties is likely to be out to lunch or gone home for the day! Few may realize that Vancouver is actually 400 miles farther north than Toronto and that the Queen Charlotte Islands are 850 miles farther west than San Francisco.

British Columbia's maritime location has prompted the development of large port facilities so that, today, Vancouver is ranked as the largest port in Canada providing British Columbia with natural linkages to the Pacific Rim countries. These ports facilitate major Canadian export markets in Japan, China, and Australia and they are central to Canada's participation in future commercial developments in the Pacific Rim.

b. Economic Base

Physiography was also a major factor in determining the nature of the Province's economy. Today, as in the past, a significant part of the province's industrial base depends directly or indirectly on the exploitation of natural resources, although the importance of non-traditional service industries has been growing.

Primary industries as a group (i.e., agriculture, fishing, forestry and mining) account for roughly the same proportion of total GDP in British Columbia as in Canada as a whole. However, there are significant differences in the relative sizes of individual industries within the group between B.C. and the rest of Canada.

For example, as a proportion of total GDP, primary forestry is between 3 and 4 times more important to the provincial economy than it is to the national economy. About 42% of total value-added in the Canadian logging industry originates in British Columbia. Similarly, the B.C. fishing industry accounts for about 25% of total Canadian GDP for fishing. Other important primary sectors in British Columbia include coal, copper, natural gas and hydro-electric power.

British Columbia's dependence on natural resources is demonstrated even more clearly in its manufacturing sector. Processing of natural resources constitutes around 70% of total manufacturing GDP for British Columbia, but only 30% for all of Canada. Not surprisingly, a substantial proportion (about 50% of manufacturing GDP in this province) is related to forestry.

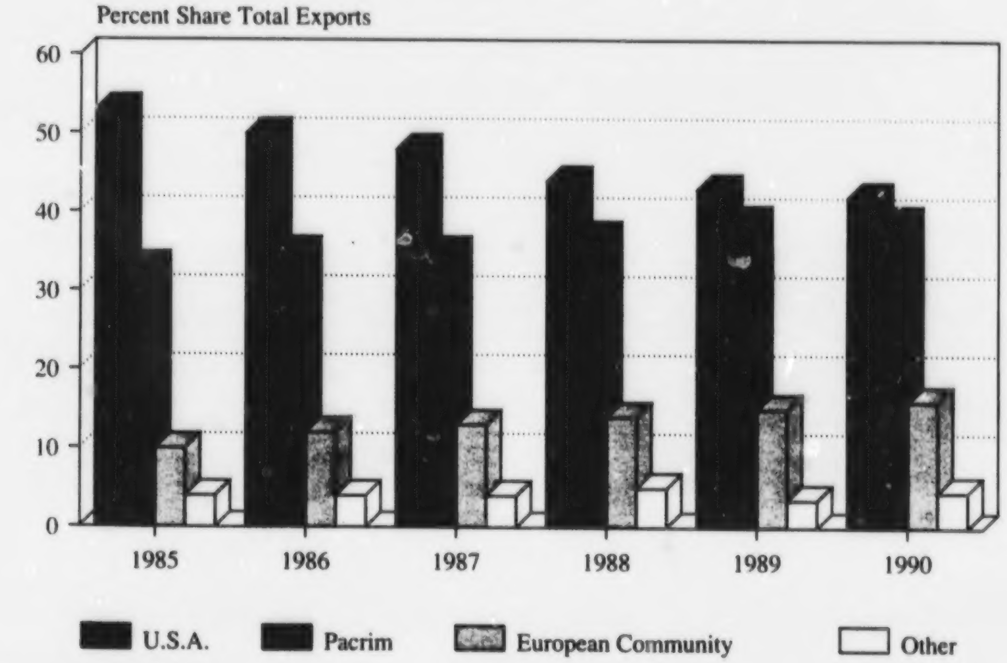
c. Trade Patterns

British Columbia has an economy that is highly dependent on trade and its pattern of exports is an extension of the province's natural resource-dominated production. Forest and mining products comprise a remarkably high and consistent percentage of total exports. Over the period 1972 to 1989 these products accounted for 80 to 85% of total foreign exports. While the province has a significant processing capability, some 90% of the value of forest and mining exports takes the form of unprocessed or semi-processed raw materials (including sawn lumber and pulp).

Some 20% of all jobs in British Columbia are dependent upon exports of commodities to foreign markets. Additional jobs are dependent upon exports of services and exports to the rest of Canada.

For over 100 years British Columbia has been trading with countries of the Pacific Rim. Over the last few years, however, British Columbia's trade relationship with the Pacific Rim has dramatically increased to the point where it now rivals the United States as the Province's leading export destination. In 1990 almost 40% of the Province's total exports

B.C. Exports 1985–1990



Source: Statistics Canada
Prepared by: BCSTATS

went to the Pacific Rim, as illustrated in the bar chart above. Likewise British Columbia exports to Europe have shown steady growth over the past five years.

The growth in exports to Pacific Rim and European countries has resulted in a healthy geographic diversification of export markets and a lessened dependence on the United States. The relatively high diversification of British Columbia's export markets compared to the rest of Canada is reflected in the pie chart below.

British Columbia used to rely heavily on the import of manufactured goods from the rest of Canada. This is becoming much less the case as provincial trade with the rest of the world grows at a faster rate than trade with the rest of Canada. In 1961 the value of British Columbia's international trade (imports plus exports) was equivalent to 34% of provincial gross domestic product while interprovincial trade was equivalent to 28%. By 1989, international trade was 43% of GDP and interprovincial trade was down to 22%.

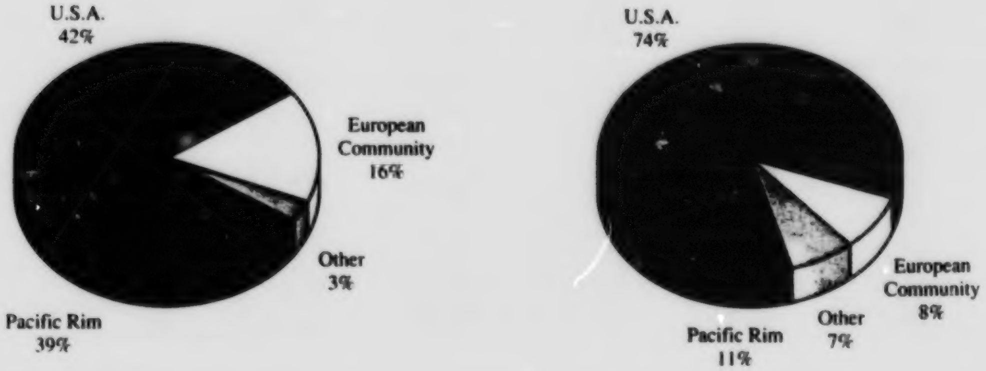
The Free Trade Agreement between Canada and the United States will provide opportunities to export more processed goods. British Columbia exports to the United States have hitherto been affected by "escalating" tariffs so that rates applied to Canadian goods entering the United States have been higher for processed goods than for unprocessed.

d. Other Economic Characteristics

British Columbia's economy is unique in Canada in other respects as well. For example, incomes tend to be among the highest in Canada while, at the same time, the Province suffers from a relatively high unemployment rate. This contrasts with the Prairies where high incomes have been associated with very low unemployment rates, and with the Atlantic provinces where high rates of unemployment are observed alongside of comparatively low income levels.

Even though rates of unemployment have tended to be high in British Columbia, employment growth has been higher than for

Destination of Total Exports
January to September, 1990



BRITISH COLUMBIA

CANADA

Source: Statistics Canada
Prepared by: BCSTATS

the rest of Canada throughout the 1960's and 70's, and particularly in the latter half of the 80's.

The main explanation for British Columbia's traditionally high unemployment rates lies in the fact that British Columbia's population growth has been exceptionally rapid and has tended to keep slightly ahead of the rate of employment creation. Much of this population growth results from the high levels of immigration to British Columbia from other provinces and countries which has, in turn, been highly responsive to economic conditions in the Province. Thus, when the economy performs relatively well it draws migrants into the Province and when the economy softens there is a slowdown in population growth.

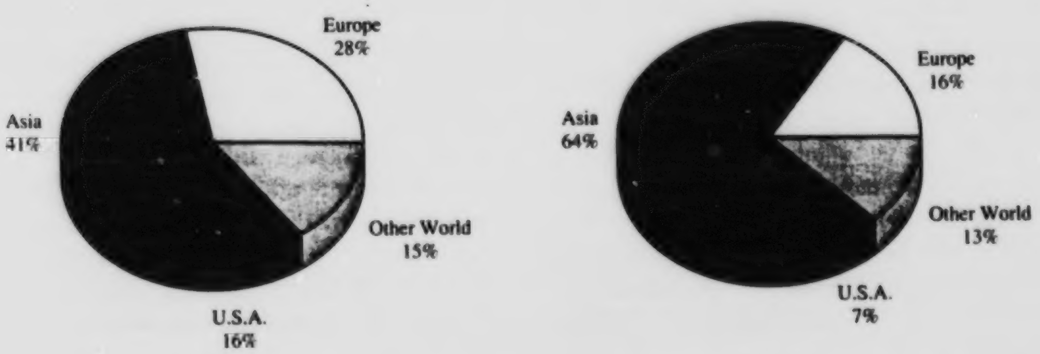
The British Columbia economy is unusual in one further respect. It tends to suffer from relatively wide swings in economic activity over the phases of the business cycle when compared with the rest of Canada. The largest part of this instability derives from the export sector and commodity prices and is therefore subject to influences beyond the control of Canadian governments. As a result, federal efforts to stabilize the national economy are often unsuitable for British Columbia. Most tax and spending programs designed to mitigate the effects of recessions on the rest of Canada have relatively little beneficial effect on the Province's economy. Additionally, monetary actions designed to reduce high inflation in central Canada have sometimes been introduced during the recovery phase of the British Columbia business cycle thereby impeding our growth.

4. Social Dimensions of the Pacific Region

a. Ethnic Background

In the late 19th and early 20th centuries, British Columbia's resource wealth attracted significant numbers of immigrants from China and Japan, but the vast bulk came from Europe, and particularly from the United Kingdom. As a result, by 1971, 90% of the Province's population was of European origin.

Source of Immigration to British Columbia



1970-84

1985-90

Source: Statistics Canada
Prepared by: BCSTATS

Since 1971 there has been a major shift in the percentage of the populations' place of origin towards a more diverse ethnic composition. Currently, the share of the population with European ancestry is closer to 80%, while it remains at 90% in Canada as a whole. In 1971, approximately two thirds of immigrants to the Province were from Europe and the United States. By 1990 two thirds of all immigrants came from Asia, while Europe and the United States combined provided just over 20%.

This major shift in immigration patterns has had a significant impact on policies and programs of governments. Nowhere is this more apparent than in the public school system in the Vancouver School District. As the following table shows, English is the second language of 41% of Vancouver's children.

PUBLIC SCHOOL ENGLISH AS A SECOND LANGUAGE ENROLMENT

(Sept. 28, 1990)

	Vancouver School District	British Columbia
ESL Enrolment	21,383	34,176
Total Enrolment	52,106	519,953
Per cent	41.0%	6.6%

Prepared by: BC Stats.

The continuation of these immigration patterns will result in a further increase in the share of the provincial population which is of non-European origin and a widening of the disparity in the ethnic mix between British Columbia and the rest of Canada. It will mean that policy makers — both federal and provincial — will have to effectively respond to and be increasingly sensitive to the complexities that occur in a society composed of diverse cultures.

B.C. POPULATION BY ETHNIC ORIGIN

(1986 Census)

Single origins	Count	Per Cent
British (1)	871,070	30.6
German	148,280	5.2
Chinese	112,605	4.0
South Asian (3)	69,250	2.4
French	68,965	2.4
Aboriginal	61,130	2.1
Scandinavian (2)	52,560	1.8
Ukrainian	48,200	1.7
Italian	46,755	1.6
Other single origins	280,990	9.9
Total single origins	1,759,805	61.8
Multiple origins	**Count**	**Per Cent**
British and Other	432,590	15.2
Other multiple	337,950	11.9
British only	319,240	11.2
Total multiple origins	1,089,780	38.2
Total population	2,849,585	100.0

(1) English, Irish, Scottish, Welsh, British and Other British

(2) Danish, Icelandic, Norwegian, Swedish and Other Scandinavian

(3) Bengali, Gujarati, Punjabi, Singhalese, East Indian, Pakistani and Sri Lankan.

Prepared by: BC Stats.

b. Labour Relations

The strength of the labour movement in British Columbia and its pattern of industrial relations set it apart from the rest of Canada. The Province's dependence on forestry and the mining industry has linked the Province's labour relations more toward the Pacific Northwest than to the rest of Canada in the development of the trade union movement. High levels of unionization and large-scale strikes by workers in the early years of the century were found throughout the Pacific Northwest. Traditionally, British Columbia has been the most highly unionized province in Canada, helping to give its industrial relations a distinctive and sometimes volatile dimension.

c. Attitude Toward Rest of Canada

British Columbians are inclined to think about their country somewhat differently than citizens of much of the rest of Canada. Our folk heroes are not so much Cabot, Cartier and Champlain as they are Cook, Quadra and Vancouver. We do not especially relate to the War of 1812 or the Rebellion of 1837 but think more in terms of the cry "54-40 or Fight" of the 1840's and the gold rush of 1858, which brought, on the one hand, fear of American imperialism and, on the other, the fact of American settlement.

Moreover, there would seem to be an ambivalence of attitude of British Columbians toward the rest of the country. While public polls consistently show that British Columbians among Canadians rank highest in their commitment to Canada, they have increasingly come to expect that Ottawa will not meet their needs and that the government of their Province will.

The psychological distance from central Canada may be even greater than the physical distance. A very colourful mayor of the City of Vancouver from a bygone day, Gerry McGeer, reflecting his frustrations over federal government indifference, said that while it is only 3,000 miles from Vancouver to Ottawa, it is 30,000 miles from Ottawa to Vancouver. The perception has not diminished over the years. Premier Vander Zalm, in addressing the First Ministers' Conference in November, 1986 picked up the theme:

> *"You know the geography of Canada is a strange thing from the point of view of British Columbia. It's almost as if we're looking at each other through different ends of the same telescope — we see Ottawa without difficulty whereas from the East, British Columbia at times seems somehow diminished in scale and size, and as a result, in importance. I make those remarks, not in any spirit of rancour or bitterness, but simply in recognition of the facts . . . the way things are."* [6]

Distance and under representation in the national institutions and the resulting lack of attention by Ottawa has, until recently, almost been accepted as the norm and has bred a feeling toward Ottawa, not so much of antagonism, but of indifference.

A long time British Columbia observer and scholar put it this way:

> *"Always politically, less often emotionally, British Columbia is part of the Canadian federation. But the extent of her integration is more open to question. It is doubtful that the people collectively feel themselves an integral part of Canadian life . . .*
>
> *In terms of geography, history, trade, and in some respects, in a way of life, the people of British Columbia often feel a sense of detachment from the rest of Canada. In its attitude to life, the province has been and largely remains a bit like the daughter who returns to the family for special occasions. Even though some of the factors, especially that of geography, have been altered by the developments of the times, they still retain some psychological influence, if nothing more. Under most of its leaders in recent times British Columbia has been chiefly concerned with its own affairs and the pursuit of its own destiny, rather than with establishing itself as a vital and integral part of the Canadian nation."* [7]

The above assessment was written twenty years ago. I would argue that attitudes have changed somewhat through the successive efforts of this Province's governments over that time to assert their interests and that of British Columbians in decision-making at the national level. Recently, it has become increasingly evident that more and more of our citizens have become dissatisfied, rather than merely indifferent, to being unrepresented and unheeded within national government structures. They would seem to be increasingly supportive of political parties that are committed to doing something about it. The popular cry "the West wants in" first found its manifestation in British Columbia through this Province's lead in calling for the reform of the country's central institutions.

B. Implications in Setting National Policy

One might ask what the foregoing recitation of "dry statistics" has to do with renewed federalism and British Columbia's place within Canada. The answer is "everything." For these glimpses of history, geography, demographics and economics show British Columbia to be a region distinct in many respects from other regions of Canada and therefore one having its own particular public policy needs. To the extent that these policy needs fall under the jurisdiction of the Province, they are capable of being met through the policies and programs of the executive government and the laws passed by the legislature of the Province.

However, many of the Province's concerns, interests and aspirations ultimately translate into public policy needs at the national level. Because these needs may be fundamentally different from those of other regions of Canada (for the historic, geographic, demographic, and economic reasons already described) it is necessary that these needs be effectively brought to bear in the formulation of national policy in Ottawa.

The following is a list of federal policies that are of special, and in some cases, unique interest to British Columbia:

- fisheries;
- ocean oil tanker regulation;
- offshore resources;
- Law of the Sea issues, i.e., maritime boundaries;
- harbour development;
- ocean shipping;
- international trade policy;
- tariff barriers particularly for processed resource products;
- rail policy;
- an energy policy which lies between the interests of oil-consuming and oil-producing regions;
- a financial institutions' policy recognizing our strategic location on the Pacific Rim;
- policies to address high cost factors for infrastructure, hospitals, health delivery, highways and communications due to topographic and demographic characteristics;
- forest policy;
- special regional economic development needs;
- policies to cushion the wide swings in economic activity over the phases of the business cycle;
- particular immigration needs;
- a monetary policy that is not always tied to the economy of central Canada;
- policies to encourage high technology opportunities in the Province.

How can we be sure that these needs will be articulated and, more than that, taken into account in the formulation of national policy? We ought to be able to expect this to be done through our representatives in Ottawa. These include the Prime Minister, B.C. Senators, B.C. Members in the House of Commons, Party caucuses, federal Cabinet Ministers from British Columbia and members of major boards and commissions from this Province.

But does the record show that these persons and the institutions of which they form a part have been effective in influencing the formulation of national policies to meet the needs of British Columbians? The record suggests not. Oftentimes it is not through the lack of good intentions of the individuals involved nor does the particular party in power make all that much of a difference. Rather, it is the structural elements of the Parliamentary system and the institutional arrangements that are in place (or lack of them in certain cases) that are at fault.

Starting at the top of the federal government hierarchy and working down, is British Columbia likely to be assured that its regional interests are fully understood and met through the good offices of the Prime Minister? The Prime Minister has awesome power under our constitutional arrangements. The Prime Minister selects the Cabinet and dismisses it at will; appoints Senators; appoints the Justices to the Supreme Court of Canada; is, in effect, the head of the party and has direct control of the party apparatus which includes personal approval of candidates; sets the dates for elections, appoints all ambassadors, recommends the appointment of the Governor General and the Lieutenant Governors; initiates literally hundreds of appointments to boards, commissions and other government agencies; enters into international treaties; controls the bureaucracy, and above all, as leader of the governing party, sets the legislative and policy agenda for the government. In short, the Prime Minister occupies one of the most powerful elected offices in the world.

In 123 years, no British Columbian has ever held the office of Prime Minister.[8] The relative lack of clout within the major federal parties from this Province has seen to that. For 56 of those years the Prime Minister has come from Quebec; for 45 of those years the Prime Minister has come from Ontario. As a result, British Columbians, at least to date, have not been able to look to their Prime Minister to give particular attention to their regional needs.

Can the federal cabinet be expected to represent British Columbia's regional needs? Cabinets are usually formed with an eye to other interests as well as representing regions. Statistics show that since Confederation, Quebec and Ontario have each had representation in Cabinet equivalent to their population; the Atlantic provinces have had more than their population would warrant and the Western Provinces less.[9]

In any case, one leading observer has concluded that, over the years since Confederation, federal ministers have become less and less effective "in representing and expressing the interests that are specific to the provinces and regions they are supposed to represent".[10] As a Task Force commissioned by the Canada West Foundation found, the reasons for this include:

- larger provinces having more spokespersons at the Cabinet table are, perforce, more likely to influence decisions reached;
- a province, having elected more members to the governing party, is, as a general proposition, more likely to have a greater number of strong and articulate spokespersons available for Cabinet appointments;
- the normal desire of a government to promote its own re-election and, in order to achieve this, to maintain political support in the most populous regions of the country, militates against relatively smaller regions having favourable policy decisions made in their interest if those differ from the interests of the larger regions;
- the increasing tendency in recent years to strengthen the office of the Prime Minister has resulted in a corresponding decline in the power and significance of individual cabinet ministers;
- cabinet solidarity and strong political parties have made it impossible for regional ministers to muster cross-party support on regional matters.[11]

Moving down the hierarchy, can British Columbians expect their Senators to represent their interests? Certainly not as the Senate is constituted at the present time. What kind of effective regional representation can British Columbians expect from an institution in which the number one and number two provinces (in terms of area, population, gross domestic product, labour force, etc.), Ontario and Quebec, each have 24 Senators whereas the third province, British Columbia, has only 6?

(Other reasons why the present Senate is inadequate to represent this Province's regional interests are set out in Chapter III B. of this Paper.)

Can the members of the House of Commons from this Province be expected to be champions of our regional interests in the national law-making process? Two factors operate against them being so. First, the overly rigid application of party discipline, applied to the aspirations of individual members, with the subtle and not so subtle punitive measures that can be imposed by the party leader, effectively prevents the member from "stepping out of line" to speak up in the interests of his or her region. A case in point is the recently passed G.S.T. How many federal government members from Alberta consistently spoke up to express the overwhelming opposition of their constituents to the measure. Only two and they were thrown out of caucus for their trouble.[12] Instead of representing their constituents to Ottawa, because of the rigours of party discipline, Members have become more and more inclined to represent Ottawa to their constituents.

Another example, which shows the absurd lengths to which the concept of party discipline has gone, emerged during the recent Parliamentary debate over Canada's involvement in the Gulf War. On what is by any definition largely a matter of conscience, the former leader of the Liberal party broke ranks with his party and supported the government's position. Dire consequences were proposed to be visited upon the member for voting contrary to his party. The party caucus chairman said that "the caucus must consider expelling their former leader or otherwise disciplining him."[13]

In the context of the tyranny of party solidarity which obviously prevails at the present time, it is not likely that members of the major federal parties now represented in Parliament are likely to venture forth into the dangerous waters of putting their constituents' interests or the interests of their region, ahead of the interests of their party.

In the case of British Columbia, one further factor is at play in terms of our representation in the House of Commons. As a Province we are inclined to be consistently under-represented. Like all provinces, our representation in the Commons is based on our population in relation to the rest of the country. Seats are apportioned on the basis of the decennial census. No one can seriously object to that concept. But there is a significant time lag between the census and the reapportionment of seats. For example, the 1991 census figures will not be used in determining the number of seats in the Commons from this Province in the next federal election expected by 1993. The first time the 1991 census figures will determine the number of seats to which British Columbia is entitled is in the federal election *after* the next one, which could be as far away as 1998. A 1993 general election would be based on *1981* population figures!

In most provinces, this lag doesn't matter much because their populations may be growing more or less at the same rate as the national average. But, in British Columbia, our population is growing at almost *twice* the national average. Hence, we are always significantly under-represented in the House of Commons.

Can this Province look to our representation on major federal boards and commissions to address our needs as a region? Unfortunately, here too, the experience is bleak. In the late 70's the Province undertook a profile of the members of the boards of directors of the major federal regulatory agencies and commissions which are so instrumental in developing and implementing federal government policy on a wide range of significant areas of public policy. Nineteen such agencies were examined. These included the National Energy Board, the Canadian Transport Commission, the Canadian Radio-television and Telecommunication Commission, the Bank of Canada, the National Harbour's Board, etc. On average, the boards of directors for each of these agencies number about 15 persons. Based on population considerations alone, one would expect to have at least one and possibly two British Columbians as directors on each of these boards. What we discovered was that there were no British Columbians[14] on 11 of the 19 agencies.

A more recent study undertaken elsewhere of 12 federal regulatory agencies showed that, in relation to workplace at the time of appointment, 30% lived in Ottawa-Hull; 24% in Quebec outside of Hull; 18% in Ontario outside of Ottawa; 10% in the Atlantic provinces and 18.5% divided among the four Western provinces.[15]

(Federal boards and commissions will be dealt with at greater length in Chapter III F. of this Paper.)

Summary

As the above review indicates, the present institutional framework at the centre of the country is not conducive to the particular policy needs of British Columbia being articulated, much less taken into account in national decision making. The track record is abysmal. Natural forces (geography, economy, historical development, demography) have *made* British Columbia remote from the rest of the nation. Unfortunately, the present institutional framework at the centre of the country has *kept* us remote by not addressing our Province's particular and special policy needs.

One of the secrets to a satisfied British Columbia within Confederation is to be found in restructuring the central institutions in such a way as to allow British Columbia a fuller and proper voice in the formulation of crucial national policies and federal-provincial issues. Such an approach — regional power at the centre — would not weaken our federation but strengthen it and would give British Columbia and all parts of Canada a more vital role in the governance of this great country. Many of the proposals for reform set out in this paper are directed to this end.

II. Constitutional Reform to Date

A. Introduction

> *"Not to know what has been transacted in former times is to be always a child. If no use is made of the labours of past ages, the world must remain always in the infancy of knowledge."* [16]

Canadians prepare themselves for the task of constitutional negotiations in the near future not with a blank sheet of paper before them but in the light of 123 years as a federation and having over that time recorded major constitutional achievements that brought Canada to full nationhood.

The fundamental part of our written Constitution continues to be the *British North America Act, 1867* (now called the *Constitution Act, 1867*) together with the amendments and additions which have been made to it over the years since.

Until 1982, Canada had been able to amend the *Constitution Act*, 1867, with the help of the U.K. Parliament, some twenty-two times.[17] On three of these occasions the powers of provinces were affected so that unanimous provincial concurrence was first obtained.

By far the most significant constitutional event in our history was the patriation of the Constitution in April 1982. Fifty-five years of intermittent efforts by the senior governments in Canada to agree to a formula to amend the Constitution *in* Canada *by* Canadians were successfully concluded at the federal-provincial negotiating table on November 5th, 1981 and proclaimed into law by the Queen during her visit to Canada the following April.

No longer would Canada have to petition the British Parliament to amend our Constitution. By the act of patriation, coupled with the amending formula, these powers would now be in Canadian hands thus removing the last vestige of Canada's colonial status.

Although the deal did not bear the agreement of the Government of Quebec, it was hailed by all sides in the rest of Canada as a major achievement. And so it was.

In more recent days insufficient attention has been given to the fact that the Meech Lake Accord would have seriously undone some of the significant achievements reached at the time of patriation. This is described in detail below and is most relevant given the current attempt, by spokesmen for the governments of Canada and Quebec and others, to undermine our Constitution's amending formula.[18] As will be shown, Quebec's insistence during the Meech round to alter the amending formula agreed to in 1981, was one of the principle reasons for Meech's failure.

Unfortunately, efforts persist to discredit the Constitution's amending formula and to replace it with one which would give Quebec a veto over reform of the national institutions including the Senate. This would be achieved by removing Senate reform from the category of amendments now requiring the consent of only seven provinces, having 50% of the population of Canada, and placing it in the category of amendments requiring unanimous approval. For reasons developed in this paper, these efforts at altering the amending formula should be resisted strenuously by British Columbia and other provinces who seek Senate reform.

We have lost sight of the fact that the western provinces and others paid a very high price for obtaining the present amending formula. The brief review which follows traces the history of the patriation negotiations, the substance of what was agreed to at that time, and the serious implications of now entertaining any changes to the amending formula.

B. The Patriation of the Constitution, 1981

1. British Columbia's Priorities

Although the effort to patriate the Constitution began in 1927 and was attempted by governments intermittently thereafter until success was achieved in 1981, this Province's serious efforts to address these and other constitutional reform issues in the more recent context can be said to date from late October 1977. Shortly thereafter, Premier W. R. Bennett established a Cabinet Committee on Confederation,[19] appointed an academic advisory group of six prominent academics[20] and appointed a Deputy Minister of Constitutional Affairs.[21] The mandate given was to develop a set of constitutional proposals addressing the needs of British Columbians so that when negotiations between governments on these subjects got under way, this Province would be equipped to make a positive contribution to the debate rather than be merely reacting to Federal government proposals as had so often been the case in the past.

In October, 1978 the British Columbia proposals were made public at a First Minister Conference on the Constitution in Ottawa. Those proposals[22] were not decentralist in emphasis nor were they designed for the exclusive benefit of British Columbia. They did not call for more constitutional powers for the provincial legislatures, under section 92 of the Constitution, but called for major reforms to the central institutions of the country so as to give provinces a great say in *national* decision-making — thus strengthening rather than weakening — the federation.

The central institutions which the Province had in mind were the Canadian Senate, the Supreme Court of Canada, and the major boards and commissions of the Federal government to which reference has already been made. This concept was described as "centripetal federalism."[23] That is, more power for the provinces at the centre; more power in the decision-making process in Ottawa rather than more powers for provinces in their own provincial capitals.

It was a concept that was not espoused by any other governments at that time but which, over the years, has been embraced by many of them. When British Columbia's proposals were first introduced the prospect of a greater say for provinces in the central institutions of the federation seemed to be of little interest to most of the other premiers. Eyes "glazed over" with indifference. Prime Minister Trudeau, however, was attracted by the concept. In a letter to Premier Bennett, the Prime Minister praised the "range and depth" of the B.C. proposals and described them as "most impressive and a major contribution to the national debate."[24]

At the First Minister's Conference of October, 1978, the Prime Minister gave the B.C. senate reform proposals high praise[25] although a subsequent federal proposal for Senate reform was a pale imitation of the B.C. proposal on the subject and proved to be a non-starter.

Mr. Keith Spicer, then a columnist with the Montreal Gazette, said this of the B.C. proposals:

> *"Coiled, crisp and deadpan-passionate, Bill Bennett spoke of Canada as an eager, though unheeded, lover.*
>
> *Waving a reproachful position paper at Canada's 10 other first ministers, he seemed the only provincial man at last week's Ottawa summit on the constitution not to plead for more than money or jurisdictions.*
>
> *As premier of British Columbia, Bennett asked for that most ancient and elusive of B.C. dreams: a chance to be listened to in making Canada work."* [26]

The need for the reform of the Upper House, in ways strikingly similar to those proposed by British Columbia, was recognized in the subsequently released reports of the Pepin-Robarts Task Force, the Beige Paper of the Quebec Liberal Party, the Canadian Bar Association Report and studies of the Canada West Foundation. In all of these cases, extensive "behind the scenes" discussions had taken place between B.C. officials and the principals and officials of those other bodies.[27] Without question, the B.C. proposals had a significant influence on the nature of the proposals which those bodies subsequently put forward.

Meanwhile, in May, 1980, Quebec held a referendum asking voters if they wished to pursue "sovereignty association" within Canada. This would have involved negotiating a new status for the province, making it "sovereign" but still associated economically, and in other ways, with the rest of Canada. The voters said "NO", by a margin of 60–40%. Before the referendum, the federal government and other governments including British Columbia, promised the citizens of Quebec that, if they would but vote "NO" in the referendum, these governments would negotiate a renewed form of federalism to address Quebec's long-standing constitutional agenda.[28]

2. The Federal-Provincial Negotiations

Ostensibly in furtherance of this promise, in the summer of 1980, the federal government and the provinces held three solid weeks of meetings culminating in a major First Ministers' Conference in September in Ottawa. There were twelve items on the agenda including patriation, an amending formula, the Charter of Rights, the principle of equalization, the reform of the Senate, the Supreme Court of Canada, offshore resources, and powers over the economy.

By the end of the summer, and even in the face of substantial agreement on a number of these issues, the intransigence of the federal government on the subjects on the agenda of interest to the provinces and the similar intransigence of the provinces on issues of interest to the federal government (namely, greater powers over the economy and the entrenchment of a charter of rights) resulted in no agreement. Premier Bennett, in his closing speech, called for more discussions to resolve the impasse as did other premiers.[29]

3. Federal Government Unilateralism Resisted

In spite of the call for more negotiations, the Prime Minister took the audacious step shortly afterwards of attempting to proceed unilaterally to ask the U.K. Parliament to patriate the Constitution with a charter of rights and a complicated amending formula never before seriously discussed with the Provinces. Only Ontario and New Brunswick supported the federal initiative.

In that this action, and the substance of the changes that accompanied it, did not bear substantial provincial support, this move was clearly contrary to the federal principle and was viewed by many as being unconstitutional.[30] (As is discussed below, the Supreme Court of Canada subsequently held that to be the case.)

Five provinces, then six and ultimately eight, did all in their power to fight this breach of constitutional convention and mounted opposition on three fronts.

First, through the courts. The opposing provinces, initiated three References through the Courts of Appeal of Newfoundland, Quebec and Manitoba to essentially ask these Courts whether it was constitutional for the federal government to proceed to petition the British Parliament to amend the Constitution of Canada to incorporate a charter of rights, an amending formula, and other elements, without first having obtained the concurrence of the provinces. The References to the Court were unique in the sense that they sought an opinion from the Courts on a constitutional convention rather than on precise questions of law. British Columbia played a major role in framing the three questions put before the Courts.

Secondly, about this time the Foreign Affairs Committee of the British House of Commons, (otherwise known as the "Kershaw Committee") mandated itself to consider the role of the British Parliament if it should receive a request from Canada to patriate the Constitution in the form of the Trudeau proposal then before the Parliament of Canada. It invited all interested parties to make submissions. British Columbia prepared a comprehensive submission and filed it with the Kershaw Committee in London on December 1st, 1980.[31]

In addition, in December 1980, British Columbia prepared and filed a submission to a Senate/Commons Committee of the Parliament of Canada attacking the unilateral nature of the federal proposal and urging further federal/provincial negotiations.[32]

Up to the end of 1980, all of these initiatives commanded the combined support of seven provinces. To that date, Saskatchewan had not decided to join the others. It did so in the spring of 1981.

The third initiative by the objecting provinces, which by this time had come to be known as the "gang of eight", was more positive in nature. The initiatives through the courts and in London were designed to thwart the federal government's unilateral efforts. Recognizing the need to not only oppose but to seek also to formulate some positive alternatives, in early 1981, this Province[33] was instrumental in developing what came to be known as the Canadian Patriation Plan signed and put forward by the eight Premiers, including Premier Levesque, on April 16, 1981. The Plan called for patriating the Constitution, after passing resolutions through the Parliament of Canada and the legislatures of the provinces; accepting, as part of patriation, the amending formula previously described as the "Vancouver Consensus Formula," and which had been the basis for discussions at the First Ministers' Conference in September 1980; embarking upon an intensive 3-year period of constitutional renewal *in Canada by Canadians* based on the new amending formula and, discontinuing the court proceedings.

The eight premiers then invited the Prime Minister and the Premiers of Ontario and New Brunswick to join in this "Made in Canada" effort to resolve our difficulties at home rather than put the British Parliament in an untenable position. Those three governments were not about to accept the invitation.

In the meantime, the efforts of the eight provinces were bearing fruit on other fronts. On January 21st, 1981 the Kershaw Committee tabled its Report[34] on the issue and concluded that the U.K. Parliament, in considering a request for amendment or patriation of the *BNA Act* from Canada, was entitled to decide "whether such a request conveys the clearly expressed wish of Canada as a whole," bearing in mind the federal nature of Canada's constitutional system. The Committee went on to conclude that, where the requested amendment or patriation directly affects the federal structure of Canada (as they found it would have in this case), it would be appropriate for the U.K. Parliament to expect a measure of provincial concurrence comparable to "what would be required for a post-patriation amendment affecting the federal structure in a similar way." Without quantifying the degree of provincial concurrence in precise terms, this was acknowledged to mean something greater than a simple majority of the provinces, but not unanimity.

Meanwhile, in their efforts through the lower courts, the eight provinces were also meeting with some success. The Newfoundland Court found the proposed federal unilateral action unconstitutional; the Courts in Manitoba and Quebec, although split on the convention issue, did not consider the federal action to be illegal. The provinces initiating the court proceedings well knew that the court decision that mattered was that of the Supreme

Court of Canada — the final arbiter in such issues. The proceedings had been commenced in the various Courts of Appeal because under our present constitutional arrangements, this was the only route by which the provinces could reach the Supreme Court of Canada.

On September 28th, 1981 the Supreme Court of Canada handed down its historic decision[35] giving comfort to both sides. The majority on the Court said that, although the unilateral action by the Parliament and Government of Canada acting alone was technically legal, it was contrary to constitutional convention. The Court went on to say that our Constitution consists of two elements: the law and the constitutional conventions.

The eight provinces had the decision they wanted. They had only argued that the unilateral action would be contrary to constitutional convention.

Elsewhere, the eight provinces in opposition were mounting an effective lobby in London. It was most uncertain that a resolution coming from Canada bearing just two provinces' support would pass the British Parliament. The continued Canadian support for the Canadian Patriation Plan, developed by the eight premiers, and a general desire on the part of the Canadian people to resolve our difficulties through negotiation *in Canada* provided a further catalyst towards agreement. Prime Minister Trudeau's earlier comment that all the British Parliamentarians had to do was "hold their nose and pass it" did not sit well with British Parliamentarians many of whom seemed to comprehend the nature of a federal system (although Britain is not one) to a greater extent than many of our own Members of Parliament in Ottawa.

4. Federal-Provincial Agreement Achieved

A genuine desire by Canadians to settle their differences in Canada; the findings of the Kershaw Committee; successful lobbying by the "gang of eight" in London; the decision of the Supreme Court of Canada; and the positive alternative provided by the eight premiers' Canadian Patriation Plan of April 16, 1981 all combined to cause the federal government to return to the negotiating table of First Ministers on Monday, November 2, 1981.

For the next ninety hours First Ministers entered upon an intense round of negotiations on the fifth floor of the Conference Centre in Ottawa and in hotel suites nearby. They began with clearly defined and dramatically opposite positions.

For its part, the federal government insisted that the patriation package must include a charter of rights and favoured the amending formula which had been discussed in Victoria in 1971. Two provinces, Ontario and New Brunswick, were in general support of the federal position, although at this time Ontario supported only an abbreviated charter of rights.

The other eight provinces, still in alliance with one another, were generally against an entrenched charter of rights on principle. They felt that human rights and individual freedoms could better be extended through ordinary legislative action, as had been the previous practice in Canada and Great Britain. They felt that to transfer to the judiciary, decision-making on broad issues of social policy, was neither democratic, nor particularly efficient and not necessarily progressive in result.

It is important to note that the proposed Charter of Rights and Freedoms put forward by the federal government (and subsequently agreed to) contains much more than what one might describe as the traditional individual rights and freedoms enjoyed in a democratic society. This Charter of Rights includes a significant number of *collective rights* related to linguistic matters. These are contained in sections 16 to 23 inclusive of the Charter which:

- constitutionalize English and French as the "official languages of Canada" having equal status in all federal government institutions;

- constitutionalize English and French as the official languages of New Brunswick having equal status in the legislature and all institutions of the government of New Brunswick;
- reinforce the constitutional right, provided in Section 133 of the *Constitution Act*, 1867, to speak English and French in the Parliament of Canada (but does not, interestingly enough, reconfirm the right, also provided by Section 133, to speak English and French in the National Assembly of Quebec);
- confirm the constitutional right, also provided in Section 133 of the *BNA Act*, 1867, to use either English or French in a court established by Parliament (i.e. the Supreme Court of Canada and the Federal Court of Canada) but does not reaffirm a similar right, also provided by Section 133, in the Courts of Quebec;
- provide bilingual rights in the courts established in New Brunswick;
- provide a constitutional guarantee for the public to communicate in either official language with any head or central office of an institution of the Parliament or Government of Canada and any other office of the federal government where there is significant demand;
- extend similar language rights to the public to communicate with similar offices and institutions in New Brunswick and, most importantly of all,
- extend public funded minority language educational rights across Canada to children in the official language first learned and understood by their parents where numbers warrant;
- extend public funded minority language educational rights Canada-wide giving to the children whose parents had been educated in the minority official language the right to be educated in that language where numbers warrant. (Interestingly this provision does not come into force in Quebec, unless and until it is so authorized by the legislative assembly or government of Quebec.[36] No such authorization has yet been made. The provision, however, is in force in the rest of Canada.)

In summary, these language provisions of the Charter extended enormously the constitutional guarantees of the French language in Canada. Up to this time, only one section of the Constitution, namely Section 133 of the *BNA Act*, dealt with language. It provided equal right to the use of English and French in the Parliament of Canada and the Legislative Assembly of Quebec and the Courts of Canada (namely the Supreme Court of Canada and the Federal Court of Canada) and the Courts of Quebec.

All other federal government programs and policies that promoted the use of the French language above and beyond Section 133, up to this time had no specific constitutional base. The language provisions in the Charter, not only gave constitutional legitimacy to much of what was legislatively in place at the federal level, but they went much further to constitutionally embrace in large measure the recommendations of the Royal Commission on Bilingualism and Biculturalism some ten years earlier.

Some might reasonably argue that the ostensible promotion of human rights by the federal government through moving the country towards an entrenched Charter was merely the sugar-coating around the more bitter pill of constitutionalizing language rights. They might say that Prime Minister Trudeau was far more interested in entrenching the linguistic rights of the French minority language collectivity in Canada than he was in entrenching individual rights and freedoms. If both could be achieved then, of course, from a federal government perspective, so much the better.

To sum up, going into the November 1981 negotiations, the federal government and to some extent Ontario and New Brunswick, on the one hand and, a majority at least of the other eight provinces, on the other, were poles apart on the issues. Prime Minister Trudeau despised the eight province amending formula. He said it would lead to a "chequer board" Canada because of the provision within it which would allow provinces to opt out of amendments which would otherwise transfer powers from the provinces to the federal government. On the other hand, a majority of the provinces were diametrically opposed to an entrenched Charter of Rights on principle, holding to the view that rights were better extended by legislatures popularly elected and accountable to the people for their actions.

And yet, agreement was reached on November 5, 1981. It was a monumental achievement and obviously required a substantial degree of compromise. In short, the provinces "bought" Mr. Trudeau's Charter of Rights, complete with its extensive linguistic package and, for its part, the federal government "bought" the eight province amending formula.

The successful conclusion leading to patriation required, as is the case in all full and meaningful negotiations, a great deal of give and take on both sides. Trade- offs, such as the "notwithstanding clause" were necessary. Neither side were happy but, in the typical Canadian way, an agreement was reached paving the way for the formal patriation of the Constitution; the entrenching of a Charter of Rights; the putting in place of a constitutional amending formula; the recognition of existing aboriginal rights; entrenching the concept of equalization and strengthening provincial power over non renewable natural resources.

5. Quebec's Disapproval

Only Premier Levesque for Quebec would not support the Agreement. The reasons which he gave at that time were threefold. He was concerned with the mobility clause within the Charter which guaranteed the free movement of Canadians within Canada. He feared that the immigration of non-French speaking Canadians into Quebec could alter its linguistic balance. (Inasmuch as the inflow into Quebec from the rest of Canada is small, it is difficult to consider how this could be a major concern.) Secondly, he was concerned that the minority language education rights in the Charter would limit the powers of the Quebec Legislature on matters of education. (But the patriation package, on its terms, provided that one of the two minority language education rights would not apply in Quebec until Quebec's National Assembly had approved it). Thirdly, Premier Levesque was concerned that a province which "opted out" of an amendment transferring its rights and powers to the federal level, (as it would be entitled to do) would only receive compensation if the subject matter related to education or cultural matters.[37]

In retrospect, these three points could not reasonably be considered as "deal breaking." While the other parties to the negotiations seemed to be willing to swallow camels, Premier Levesque seemed to be determined to strain at gnats.

Parenthetically, it is of significance to note that only one of the three points objected to by Quebec at the time of patriation were advanced by Quebec in the Meech Lake round. One would have expected that the sticking points which resulted in the alleged grievance of Quebec over patriation would have been those which Quebec would seek to redress at Meech Lake. Instead, the Government of Quebec embarked upon a more ambitious agenda.

While it is regretted that the Government of Quebec did not see fit to be part of the patriation agreement, its failure to do so has no effect on the application of the Constitution to that province nor was it, in my view, sufficient cause to have justified the so-called "Quebec round" which led to the abortive Meech Lake Accord.

Jumping ahead, for a period of three years up to June 1990, the Canadian public was bombarded by politicians and commentators alike on the perceived need to have Quebec wooed "into the Constitution". The outcry, accompanied by appropriate hand-wringing, reached crescendo proportions during the closed enclave of First Ministers in June, 1990.

The point was pressed in a variety of ways. Some saw Meech Lake as necessary to "bring Quebec into the Canadian family" or "to give Quebec its rightful place at the Constitutional table" or to "get Quebec within the Constitution".

All of these rhetorical expressions tended to confuse, if not intimidate, an already bewildered Canadian public. Even otherwise well-informed Canadians were led to believe that somehow the Constitution did not apply in Quebec because that province had not agreed to the 1981 patriation package. Such, of course, is not the case.

The patriation package amendments crystallized into a vital part (but only a part) of Canada's Constitution upon the issuance of a Proclamation by Her Majesty the Queen on Parliament Hill on April 16, 1982. At that time, these amendments became binding and effective throughout the whole of Canada, including Quebec.

The lack of support by Quebec has no adverse effect on either the validity of the Constitutional amendments generally or in their application to the Province of Quebec in particular.

This is because the measure of provincial support necessary to approve the patriation package subscribed by the Supreme Court of Canada in the Constitutional reference case of 1981, above referred to, had been fully met. The Court decided that "substantial provincial support" was all that was necessary, without quantifying precisely how many provinces that meant. The concept of provincial unanimity was specifically rejected by the Court. Similarly, as is pointed out above, the Kershaw Committee had taken a similar view.

All of the governments entering upon the patriation negotiation in November, 1981 were aware of these ground rules. None of the actors, including Quebec, were labouring under the delusion that unanimity was necessary. All understood that one, or perhaps two or three provinces, could disapprove the patriation package and it nonetheless could go forward.

What had been considered to be the Constitutional convention up until the decision of the Supreme Court of Canada in September, 1981 had been significantly altered by the Supreme Court's decision of that date. Up to that time, in the absence of a domestic amending formula, it was assumed that any change to the Constitution affecting provincial rights and privileges required the unanimous support of the provinces. That is why when Quebec disapproved the Fulton-Favreau formula in 1964 it had the effect of scuttling the Constitutional exercise of that date. The same can be said of the Victoria Charter exercise culminating in June, 1971. At that time Quebec's disapproval was sufficient to scuttle comprehensive constitutional reform attempts that had extended over a three-year period.

That the unanimity rule was no longer in effect for the patriation round had been, as is indicated above, made clear by the Supreme Court of Canada. As one distinguished academic put it:

> *"The tyranny of unanimity which had been used as a justification for unilateralism by Ottawa, and which had frustrated the possibilities of intergovernmental agreement, no longer existed as a cohesive force to keep the dissenting provinces in a common front of opposition. Unanimity had become, in Blakeney's words, no more than a 'ghost of conferences past'."*[38]

After patriation, the Quebec Government of the day was not satisfied that there no longer was indeed a Quebec veto. It sought the opinion of the Court on whether "sufficient provincial consent" must include Quebec. It argued that Quebec was "a separate society within a Canadian duality" and therefore its consent was necessary. Both the Quebec Court of Appeal and by nine judges to none, the Supreme Court of Canada rejected the Quebec arguments.[39]

To sum up, there is no legal or constitutional basis to support the proposition that Quebec is not fully "in" the Constitution now. Although there are many other subjects ripe for constitutional reform, the patriation package is a *fait accompli.*

C. The Amending Formula

1. Introduction

Inasmuch as a country's constitution provides the basic framework for political life within the state, including the principal institutions of government and their powers, and the relationship between those institutions and its people, a constitution must provide to the greatest degree possible, some measure of stability and certainty. Constitutional stability is achieved by making changes to the constitution more difficult than changes to ordinary laws.

On the other hand, a country's constitution should be its servant and not its master. The constitution is made for man and not man for the constitution. Thus a constitution must provide a means by which it may be changed so that governments may meet new circumstances and respond effectively to varying public needs. The amending formula, then, must assure a proper balance between stability and a degree of certainty on the one hand, and flexibility on the other.

In a federal state, such as Canada, where sovereignty is divided between two levels of government, there is a need to ensure that there is a sufficient measure of provincial agreement to any proposed amendments affecting the federal character of the country. The "national will", on the other hand, is reflected through the Federal parliament. Both constituencies must be satisfied.

These and two other strong currents were in play at the time Canada's amending formula was agreed to in November 1981. One was the view, particularly on the part of the resource rich provinces, that the amending formula ought not to permit constitutional amendments which might transfer to the federal government the proprietary interests or jurisdiction of provinces opposing such amendments.

Secondly, there was, and still is, a strong current of *equality* running among the provinces. Whereas in 1971 most provinces were agreeable to an amending formula which gave a veto to both Ontario and Quebec, with the rest of the provinces having to coalesce with other provinces in order to mount a veto, by 1980 this approach was totally unacceptable to almost all provinces (except, of course, Ontario and Quebec). The cry of "first class" and "second class" provinces began to be heard with greater frequency. As a result, at least for purposes of an amending formula, "equality of the provinces" became the order of the day.

2. The Substance of the Formula

Any amending formula that was developed, therefore, had to meet the criteria of stability; flexibility; satisfy the protective instincts of the resource-rich provinces; and embrace the concept of equality of the provinces. In a remarkable way, the 1981 Amending Formula met all of these tests. The Formula requires as follows:

- the consent of the Senate, the House of Commons and the legislative assemblies of two thirds of the provinces representing at least 50% of the population of all the provinces, for **most** amendments to the Constitution; (hereinafter referred to as the 7 and 50 rule.)
- if, however, an amendment takes away from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province, a legislative assembly may opt out of the amendment and it would not apply to that province;
- furthermore, if a province did opt out of an amendment conferring legislative jurisdiction on Parliament in the subject areas of education or culture, the Government of Canada would provide reasonable compensation to the opted-out province;
- amendments to *existing provisions* of the Constitution which apply to one or more, but not all, provinces require the consent of the Senate, the House of Commons and the legislative assemblies of every province to which the amendment would apply:
- amendments in relation to:
  - — the principle of proportionate representation of the provinces in the House of Commons;
  - — the powers of the Senate and the method of selection of members thereto;
  - — the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of senators;
  - — the Supreme Court of Canada (except its composition);
  - — the extension of existing provinces into the territories; and
  - — the establishment of new provinces,

  would be made under the 7 and 50 rule, but with no right to opt out;
- amendments in relation to:
  - — the office of the Queen, of the Governor General or of the Lieutenant Governor;
  - — the right of a province to a number of members in the House of Commons not less than the number of senators representing the province at the time of patriation;
  - — the use of the English or French language (except for provisions applying to one or more, but not all, provinces);
  - — the composition of the Supreme Court of Canada; and
  - — amending the amending formula,

  require unanimous consent.

In all cases, the role of the Senate in approving constitutional amendments is limited to a suspensive veto of six months.

In a nutshell, all amendments that would involve changes to the division of powers between the two levels of government require the approval of the federal government and seven provinces, having 50% of the population. Any such amendment that transfers powers from the provinces to the federal government would not have effect in any province that chose to "opt out" of such amendment.

Amendments to the Constitution that would involve changes to the Senate; some changes to the Supreme Court of Canada; the principle of proportionate representation to the House of Commons; and the establishment of new provinces would be made under the 7 and 50 rule but, obviously, because these are changes to the central institutions of the federation, there would not be a right to opt-out.

Finally, a very few subjects require unanimity, including amendments to the constitutional amending formula itself. This latter requirement is of particular importance in the light of the Meech Lake negotiations. Its significance will be explained later.

Thus, after 50 years of trying and through those difficult and often acrimonious negotiations of 1980-81, a domestic amending formula has been agreed to that is now a vital part of our Constitution.

3. The Importance of the Amending Formula to British Columbia

There is little in the patriation package for British Columbia. Entrenching equalization was a boon to the Atlantic Provinces and Manitoba and, to a lesser extent to Saskatchewan and also to Quebec which, despite the obvious wealth of its natural resources, is a province that has always been on the receiving end of equalization payments. The provisions in the patriation package that extended the indirect taxing power to provinces on non-renewable natural resources were of particular attraction to Saskatchewan and Alberta. They were not of great benefit to British Columbia because most of British Columbia's natural resources are Crown- owned (under long-term tenure to private resource developers) and therefore the economic rent can be recovered by the government by the imposition of royalties without having to resort to indirect taxation.

The one thing that British Columbia *did* achieve out of the patriation package was an amending formula which would give British Columbia a "fair shake" at Senate reform which, as is pointed out above, has been this Province's long-standing constitutional priority. For, under the amending formula, comprehensive Senate reform would be achievable under the 7 province 50% rule. Why was this so important to British Columbia?

British Columbia knew that any major reform of the Senate must, of necessity, decrease the number of Senators proportionately from Quebec and Ontario. To allow Ontario and Quebec to each have 24 Senators and relegate British Columbia to 6 Senators, is a shameful inequity in our present constitutional arrangements that would never be allowed to survive any kind of Senate reform. Hence, British Columbia's gain would be at Quebec and Ontario's loss. The seven province amending formula, having 50% of the population, meant that Senate reform would require the support of Ontario or Quebec but not both and thus, although difficult enough, would be easier than a formula requiring approval of both of those Provinces.

Lo and behold this small gain for British Columbia under the patriation package was sought to be taken away by Quebec in the Meech Lake negotiations! Quebec demanded that future reform of the Senate be removed from the 7 province 50% part of the amending formula and added to the part of the amending formula requiring unanimity of all the provinces.

Few realize that it was because Quebec wanted to *amend the amending formula* itself in respect to Senate reform that unanimity of all governments was required for the Meech Lake package. Let me explain. Although, under the amending formula, as has been indicated above, most future amendments are likely to fall within the reasonably flexible 7 and 50 rule, the drafters of the amending formula in 1980-81 wanted to ensure that making changes to the amending formula itself would be relatively difficult. Hence they provided that changes to the amending formula itself required unanimity.

In the wake of the Meech Lake failure, the impression has been left by the federal government and Quebec that we have an inflexible amending formula and that it was the "tyranny of unanimity" which led to the failure of Meech Lake. Not so. It is only because of Quebec's insistence to amend the amending formula (it can be reasonably assumed so as to block Senate reform in the future) that unanimity was required. All of the other items in the Meech Lake package could have passed under the 7 and 50 rule, i.e. distinct society, powers over immigration, appointment of Senators, appointments to Supreme Court, limitation on federal spending power, etc., etc.[40]

Ironically, those who are now claiming that the present amending formula is inflexible and unworkable are those who sought to make it more rigid by adding to the category of matters requiring unanimity the large subject of Senate reform and changes to the Supreme Court of Canada.

Similarly, those who are now claiming that the amending formula is unworkable cite "the 3 year requirement" in respect of amendments. There is no requirement to wait 3 years before an amendment agreed upon takes effect. In fact, the 3-year period is a deadline designed to speed up the process not to slow it down. The rationale is that 3 years should be sufficient time to complete the process of amendment through the requisite number of legislatures and Parliament. If it can be done in less time, so much the better. The amendment becomes law that much quicker.

4. The Amending Formula Works

Moreover, although the amending formula only came into force in 1982, already it can be shown that it works and it works expeditiously. Following patriation a constitutional conference was required to be held, to address aboriginal matters. That conference agreed on certain substantive constitutional changes relating to aboriginal rights. In 1983, these, together with a constitutional provision to hold further aboriginal conferences, were added to the Constitution through the use of the 1981 amending formula. Resolutions were passed through Parliament and nine provincial legislatures to effect these amendments in the period of sixteen months.[41]

These provisions then came into force. This shows that the 3-year provision is not an impediment to speedy constitutional amendment. It is the political will, not the amending formula, that dictates the speed by which amendments are made.

There is nothing wrong with the amending formula and British Columbia should resist all attempts to change it. As the earlier part of this Paper shows, British Columbia paid a very high price for it and should not give it up unless, of course, those who propose changing it would agree to repeal the entrenched Charter of Rights which came along with it. For some future limited advantage under an attractive amending formula, British Columbia agreed to join others in exchanging the proven concept of Parliamentary supremacy for the dubious results of judicial review, embraced significant minority linguistic rights particularly in the area of education and put its own constitutional priorities on hold. For that high price, British Columbia should take the position that changes to the amending formula will not now be entertained.

To suggest that no changes are necessary to the formal amending formula is *not* to deny that there are badly needed changes to the *process* by which amendments are arrived at. Truly representative interest groups, so-called informed citizens and, above all, the Canadian public must be consulted and actively involved in future constitutional reform and at an early stage.

The failure to involve the public, and even then not to allow their views to in any way significantly affect the outcome, is no longer acceptable. One Western Canadian scribe, in referring to the Meech Lake negotiations, aptly makes the point:

> *"Lincoln ended his Gettysburg address with the prayer that "government of the people, by the people, for the people, shall not perish from the earth". In Canada these days it is well on the way to perishing. In its place we are getting government behind the people, without the people, and in spite of the people. In all the silly farce, phony drama, amateurish conniving, and preposterous tragedy implicit in the Meech Lake calamity, nothing stands out so conspicuously as the singular and relentless determination to keep the people out of it. Everything that has been done delivers that same message. Canada must be saved. Saved from whom? Saved from the Canadians, obviously. We cannot be trusted.*
>
> *The accord, therefore, is arrived at in a secret meeting of the premiers. By common agreement, 'it is passed by the complying legislatures without public hearings. Parliament, which is required to hold hearings, holds them briefly and at Ottawa where the fewest possible people can attend. And finally, in yet another marathon secret meeting, the premiers strive to salvage it, lining up at a microphone at the end of each closed session to deliver little monologues, devoid of fact, and accompanied always with lugubrious testimonials for "Canada". The compliant premiers, meanwhile, are congratulated for the courageous way in which they ignored the people who elected them.*
>
> *As a work of fiction it would have failed — too improbable to be believed."*[42]

A full degree of public consultation must, in future, be achieved, but it can be done so in a variety of ways and without changing the amending formula. Proposals in this regard are developed later in this paper.

D. Unfinished Constitutional Business

The completion of the patriation round is not to say that there is not unfinished constitutional business in Canada. Indeed there is. The promises of renewed federalism made to Quebec during the 1980 referendum have, in a measure, been unfulfilled. The constitutional aspirations of successive Quebec Governments, at least since 1960, have been to seek to alter the distribution of powers between the two levels of government in Canada. Decentralization of powers has been Quebec's top priority over all of those years. Comprehensive negotiations to address those issues have simply not taken place, despite the promises given during the referendum of 1980.

But unfinished constitutional business is also the case for other provinces especially British Columbia.

On the day of patriation, April 17, 1982, I stated as follows:

> *"In measured terms, we should celebrate the joy of patriation for the symbolic act that it is, and be careful to withhold any emotional outbursts over the Charter of Rights until the judiciary through its interpretation over the next 10 years shows us its consequences. But we would be deluding ourselves if we thought that our constitutional crisis lay behind us and that we, as a federation, will live happily ever after.*
>
> *The deep-seated alienation that exists in the west towards the federal government — any federal government — because of the lack of meaningful regional input in national decision-making is symptomatic of out-moded and unfair existing constitutional arrangements.*
>
> *Only a major restructuring of our central institutions such as the Senate, the Supreme Court of Canada, increased regional representation on major federal boards and commissions to provide regions such as B.C. a stronger voice in national decision-making, will quench fires of alienation and regional discontent. These matters cry out for attention. The constitutional package just proclaimed does nothing to address them."* [43]

I went on in that article to urge that a wholesale review of the distribution of powers should also be undertaken.

But future efforts towards constitutional reform in which all Canadians and their governments are soon to be engaged must stand on their own merit. Never again should recriminations of past failures or alleged betrayals form the motivation for governments to address outstanding constitutional concerns. Suggestions that "English Canada" must "atone" for the failure of the Meech Lake Accord will simply not wash.

The patriation of the Constitution, without Quebec's agreement in 1981, is no more a rejection of Quebec by Canada than was the refusal of Quebec to agree to the Fulton-Favreau formula in 1964 or the Victoria Charter package in 1971 the rejection of Canada by Quebec.

III. Proposals for Constitutional Reform

A. Introduction

As we approach the prospect of major constitutional reform at this crucial stage of Canada's development, although we must be free "to abandon the accepted myths about how this nation works"[44] and stretch our thought processes so as to explore new possibilities, we would do well not to abandon that which has served us well. We should draw upon the experience of 123 years.

The former dean of federal-provincial relations in Canada expresses it well:

> *"We are not revolutionary France nor are we the post-revolutionary Thirteen Colonies, rejecting a past seen as evil and repressive and setting up something totally new. We are a country with a history of great accomplishment trying to retain as much as we can of what 123 years of political experience and economic development have given us. In short, we should build on what we have and not throw it away with no guarantee we can substitute something better."* [45]

Nonetheless, given the discontent that abounds throughout many parts of the country with our existing constitutional arrangements, nothing short of a comprehensive examination of *all* those arrangements and, in some cases, radical and innovative reforms will suffice. Senate reform alone will not be enough nor will massive decentralization of legislative powers alone prove viable. A proper *balance* of reforms is necessary, designed to address the needs of all Canadians and all of Canada's constituent parts including the federal government.

The reform proposals which follow — both of a constitutional and non-constitutional nature — are designed to attempt to strike that balance.

B. The Canadian Senate

1. Introduction

As this paper has already endeavoured to show, the distinct historic, geographic, cultural and economic forces at work throughout British Columbia and the other regions of Canada, call for the need for strong regionally-focused institutions within the central government to fully represent these factors in national decision-making.

Unfortunately, the nature and make-up of the central institutions of our federation have failed British Columbia in this regard. Although *made* remote by our history, geography and economy, we have been *kept* remote by unrepresentative national institutions. No better example can be shown to prove this point than the Canadian Senate.

2. Purpose of the Senate

Discussion of the structure and function of the Senate of Canada occupied a full six of the fourteen days of the Quebec Conference in 1864. The Confederation debates show that the Senate, being a part of the Parliament of Canada, was designed to perform three main functions.

First, and probably least significantly, the protection of wealth and the propertied classes. In order to ensure that Senators would be naturally disposed to the protection of wealth and privilege, the Constitution imposed what was in 1867 a rather steep property ownership threshold of $4,000 for Senate membership.

The second rationale for the Senate was the traditional one for second chambers, namely the performance of a checking or reviewing function. The Senate was to take a "sober second look" at Commons legislation with a view to making improvements.

The third, and most clearly articulated purpose of the Senate was that it represent provincial or regional interests in the making of national laws. Many of the founding fathers did not want to see provincial identities and powers completely submerged by the national government. Although a strong national identity, fostered by strong national institutions was desired, these national attributes were not to be divorced from the existing provincial identities and powers; rather it was intended that the former would flow from and build upon the latter. Accordingly, a balancing of national and provincial interests was required. The principle of bicameralism, which was made operative by the establishment of the Senate, was intended to achieve this result, with the Senate providing a vehicle to reflect regional interests and concerns within national law-making.

As one learned author on the subject states:

> *"While a strong central government seemed necessary to secure a permanent union, the exigency of the moment demanded that sectional fears be allayed by providing strong safeguards for provincial and sectional interests . . . The key to federation lay in securing adequate guarantees for the protection of provincial and sectional rights . . ."*[46]

3. The Senate's Record

These then were the three reasons for creation of the Senate: protection of the propertied minority, review of Commons legislation, and most importantly, representation of provincial interests in the national law-making process. The question is: How effective has the Senate been in performing these three functions? With some notable exceptions, apparently the Senate has not been particularly effective as a guardian of the privileges of the propertied class — and few Canadians today would want it to be. This role should be considered a dead letter.

The Senate has had some success in reviewing Commons legislation. Occasionally, the press of parliamentary business or the complexity of a subject matter provides opportunity for the Senate to perform a useful role in pointing out defects in proposed legislation and suggesting improvements. Perhaps some of its most effective work has been performed by its Committees in consideration of broad policy issues.[47]

It is in the performance of its third and most important function that the Senate has failed. Failure to represent regional interests is an undisputed fact.

The reasons for this failure are not hard to identify. Senators are appointed, in effect, by the Prime Minister, giving to Canada the dubious distinction of being the only federation in the western world, if not the whole world, in which members of the Upper House are appointed by the central government. Such a practice is anathema to the primary reason underlying an Upper House in the first place — an institution at the centre to represent the regions. Another reason for failure has been the tendency of Prime Ministers to make Senate appointments along political party lines thus resulting in the appointees adhering to the dictates of the federal party, oftentimes to the disadvantage of the regional interest. When the interests of the party whose leader appointed them come up against the interests of the regions the Senators represent, invariably the party interests prevail.[48]

Moreover, inasmuch as over the past 50 years many of the provincial governments of western Canada have been in the hands of political parties of a stripe other than the predominant parties in Ottawa, because those parties have received virtually *no* representation in the Senate, the Senate does not adequately reflect the contemporary political thinking of a large section of the country much of the time. Indeed, it may be argued that the lack of fair representation of third parties in the House of Commons (because of the first-past-the-post electoral system in that House) and in the Senate have been the very reasons why non main-stream provincial political parties have emerged in the first place.

Instead of representing the regional interest, one prominent Canadian author portrays Senators as the top advisors, the "backstage boys", and the "managerial elite" of Prime Ministers; the builders of national party organizations; the chief fund raisers; the prime ministerial "Kingmakers"; and "the chief plotters in palace revolts".[49] Hardly a recipe to reflect regional interests!

Another perceptive author, suggests that the business "Establishment" applies subtle and not so subtle pressures for adaptations of government policy to fit their viewpoint and that Senators play a crucial role in this process.[50] If this is so, it might explain in part why national policies, particularly economic policies, favouring central Canada as they have traditionally done, are so difficult to change to recognize the contemporary realities of an emerging British Columbia.

This view would seem to be supported by the attempts of the Government of British Columbia to assist certain prominent British Columbia businessmen[51] to obtain a Charter for a new bank — the Bank of British Columbia — in the 1960's. The application had to clear the Senate's Banking, Trade, and Commerce Committee. The Government of the Province filed a convincing statement in support[52] and the Attorney General, Robert Bonner, made a formidable oral presentation before the Committee.[53] Notwithstanding that the Porter Commission, and the Federal Minister of Finance had previously indicated that more competition was necessary in the banking industry of Canada, and the strong presentation of the proposed bank on its merits, the Committee turned down the application. On his return to Victoria, a frustrated Bonner, reflecting the experience of many provincial government leaders before and since in their dealings with Ottawa, exclaimed "You might as well have been speaking to them of Zanzibar (rather than British Columbia) for all they knew and cared."[54]

What actually happened is aptly described by Professor Colin Campbell in his book, *The Canadian Senate: A Lobby from Within*:

> *"The Banking Committee has come under fire from the media for another bias in its legislative review, a disinclination to approve bills which would decentralize Canadian banking. In 1964, for example, it pigeonholed three bills which granted charters for three banks: a Bank of Western Canada, a Laurentide Bank, and a Bank of British Columbia. Not only were there already enough banks in Canada, several senators argued, but the Bank of British Columbia threatened free enterprise as well, because the government of British Columbia would control it. When the press discovered, however, that four members of the Banking Committee held directorships in charter banks, they charged conflict of interest. The four senators succumbed to public pressure and disqualified themselves from the vote. (Motivated by recollection of this episode, four senators disqualified themselves in 1976-77 from the Banking Committee's review of a major bank act.) The charters for the Bank of Western Canada and the Laurentide Bank thus passed through committee. The latter-proposed bank, however, was assigned a higher required capital than it had anticipated. The Bank of British Columbia eventually won approval by Parliament in 1966."* [55]

Other reasons for the failure of the present Senate to properly reflect the regions at the federal level, have to do with the distribution of seats throughout the country. One of the means of reflecting the regional view effectively is by giving the less populated regions of Canada greater representation in the Upper House than the more densely populated regions. Alas, in Canada the very opposite is the case, thwarting the concept of regional balance. The present distribution of seats in the Senate, far from providing a stronger voice from the smaller regions, in fact, confirms rather than counter-balances, the strength which the central Canadian provinces have in the House of Commons by virtue of "rep by pop."

As to the powers now exercisable by the Senate, few seem to realize that they are almost as plenary as those of the House of Commons. The exceptions are, its inability to introduce money bills; or to block constitutional amendments; or to bring down the government through a vote of non-confidence. In all other respects, its powers are as extensive as the House of Commons. It has been the Senate's lack of legitimacy as a viable and democratic institution, for the reasons stated above, that has, as a practical matter, caused it to not very often flex its muscles and almost never specifically in the interests of the regions.

4. The Kind of Reform Needed

There are those who contend that the defects of the existing Senate are so pervasive that the best reform would be to abolish it. The main arguments for abolition are that the institution is not democratically constituted; it does not do its job well and a second House is unnecessary.

The first two arguments are valid but can be remedied by adequate reform. The validity of the third argument is most doubtful. In fact, in a day of greater regional diversity and autonomy, the need for a second chamber in Parliament is more necessary than ever and, moreover, is the norm in all federations.

Since British Columbia first proposed Senate reform in 1977, many voices have been added in support. These have brought with them a plethora of specific models for change. There are at least twenty-one different models for a reformed Senate currently on the table.

It is essential that there not be just *any* kind of Senate reform but that the institution be reformed in such a way as to properly and fully address the present inadequacies.

Credible observers of the federal system and also those engaged in federal/provincial relations on a day-to-day basis, identify two quite different aspects of the regional or provincial dimension that require adequate reflection in the central institutions of the country. One is the regional or provincial interest at large. When we speak of the "provincial interest" in this context we mean those interests which are perceived to be the interests of British Columbia citizens *qua* citizens and not the interests of British Columbia citizens as reflected through their provincial governments of the day. These interests are not necessarily one and the same.

The second provincial interest requiring reflection in the central institutions is to do with the interests of provincial *governments* as governments in the formulation of certain federal policies, programs and legislation. This has to do with the whole matter of intergovernmental relations. For there are an identifiable number of federal policy areas which impact crucially on the operations of provincial governments. To date, these interests are not effectively addressed in any formal institutional mechanism at the federal level.

That there are two separate "provincial interests", as discussed above, is recognized by those who have given serious attention to these issues. For example, the Royal Commission on the Economic Union and Development Prospects (the Macdonald Commission Report) states as follows:

> *"Commissioners have sought to keep distinct the issues of regional representation in the national government and the machinery of intergovernmental relations, although these topics have occasionally been linked."*
>
> *"Commissioners distinguish these two functions, believing that the influence of provincial governments on national policies is best left to the intergovernmental arena."*[56]

The Report goes on to point out that reform of the national institutions, as we now know them, can do little to meet the need for coordinating the actions of two strong orders of government. It states:

> *"Equally, reform of national institutions can do little to meet the need for co-ordinating the actions of two strong orders of government. We need both an appropriate relationship among governments and a regionally responsive central government. We believe, therefore, that the best way to inject the concerns of regional and provincial communities into the national Parliament is through the direct representation of their citizens, rather than through representation of provincial governments."*[57]

In sum, the Macdonald Commission recognizes the presence of these two separate provincial interests and suggests that a reformed Senate is the vehicle to meet only one of these, namely, the provincial interest at large. It, however, goes on to point out that the intergovernmental interest is also in need of attention through new institutional arrangements.

In its comprehensive paper on "Regional Representation" the Canada West Foundation came to the same conclusion. The Foreword states:

> *"One of the most revealing aspects of this analysis is the observation that there are two basic constitutional reforms needed for Canada: one is stronger regional representation within the national government itself; the other is a mechanism for resolving conflicts between federal and provincial governments. Throughout the book the task force reminds us that senate reform should not be confused with, or substituted for, the need to establish a mechanism to improve federal-provincial relations."*[58]

The writer concurs with this analysis and proposes that the reformed Senate should be designed in such a way as to represent the provincial interest at large and that there be another institution (developed in the next section of this Paper) to fill the vacuum in intergovernmental relations by providing an efficient and constitutionally formalized institution to manage interdependence between governments and "to moderate the excesses of rivalry and competition" between governments.

5. Proposed Senate Reforms

a. The Selection Process

The existing Senate is neither democratic (because Senators are appointed) nor does it represent the regions (because Senators are appointed by the Prime Minister). The existing practice of appointments is no longer acceptable for the reasons previously stated. Direct appointments by provincial premiers might be somewhat better, particularly if the names of proposed appointees were approved by the respective Legislature but this is not the method of selection proposed here.

Because it is proposed that the new Upper House should represent provincial interests *at large*, the most acceptable democratic way to do this is through Senators being popularly elected, as is the case in the United States and Australia.

We should be aware that direct popular election, however, can present difficulties in a parliamentary democracy where the principles of responsible government and party discipline are fundamental. In the American congressional system, neither of these principles applies; therefore, direct popular elections to the Senate work well. On the other hand, experience with the election of the second chamber in Australia, a parliamentary democracy, has not been without its problems. The tendency is for a directly elected second chamber in a parliamentary democracy to align itself to partisan loyalties. If left unchecked, national party loyalties are likely to dominate other interests in an elected second chamber and thus undermine its essential role as the protector of regional interests. This has been inclined to be the Australian experience.[59]

This defect, however, can and must be overcome. The best means of doing this is to divorce the election of Senators from any form of federal election. To have a Senate election at the same time as the House of Commons election, is merely to invite the federal political parties to dominate the electoral process in both Houses resulting in party alliances between the two Houses, with the interests of the regions, from which those Senators come, taking the hind-most.

Accordingly, I recommend that the election of Senators should take place in each province at the time the voters go to the polls to elect their provincial government. This would not only have the advantage of lessening the influence of national political parties, it would underscore the importance to the citizens of the province that their Senators are primarily elected to represent their regional interests in Ottawa.

There is no doubt, of course, that provincial Senate elections would also be conducted along political party lines but, in my view, it is far more desirable, and in keeping with the Senate as being the voice of the regions, to permit provincial party politics to influence the electoral process — given the diversity of provincial party politics throughout Canada — than to allow the election of Senators to fall into the maw of the federal political party machine. Party alliances between the two Houses would be less likely to occur, and this would be desirable.

I propose therefore that Senators should be elected at the time of provincial elections and that each Senator should serve the equivalent of two terms of the government of the province from which he comes before having to seek re-election. In most cases, this would mean six, seven or eight years in the Senate depending on how frequently provincial elections are held. The election of a province's Senators would be staggered so that half the Senators from that province would be chosen at each provincial election.

Some might argue that this would add a "revolving door" element to the makeup of the Senate. This is not likely to be the case inasmuch as on average there are only two to three provincial elections a year and, if only half of a province's Senators would be up for election at any one provincial election, the turnover would be relatively small. Of course, to the extent that there *is* a continuing transfusion of new life and blood into the Senate, this should be viewed as a positive rather than a negative result.

b. The Basis of Distribution of Senate Seats

Reference has already been made to the fact that the present distribution of Senate seats across the country is woefully inadequate to address contemporary realities. Nowhere is that clearer than with respect to British Columbia.

Having regard to the fact that the distribution of seats in the Upper House of the federation should, to a great degree, counter-balance the "rep by pop" in the Lower House, there are several options available. These include, equal representation by province; or, equal representation by region with the seats assigned to the region being further divided between the provinces that make up the region; or, a modestly scaled representation from the larger to the smaller provinces (as has been the case with the Laender in the Federal Republic of Germany).

Here an examination of the Canadian experience is instructive. Since Confederation, a form of equality was sought in the distribution of Senate seats by providing equal *regional* representation on the basis of certain logical regional divisions which, in the case of Ontario and Quebec, correspond with their provincial boundaries. The Maritime provinces were grouped as one region. Each of the three regions was given 24 Senate seats. But this three region concept of Canada was not a static one. By 1915, because the four western provinces had joined Confederation, or come into being, an amendment to the *BNA Act* recognized them as a fourth region and allocated 24 seats to western Canada; six to each of the four western provinces.

While it may be conceded that the basis of distribution by regional divisions in 1867 and 1915 was adequate, in the light of today's realities this degree and means of representation is seriously out of line and provides for neither equal representation by province nor reasonably equitable representation by region. An effective case can be made that Canada has now evolved into a country composed of five regions, the fifth being British Columbia, and that representation in the new Senate should be based accordingly. This was the position put forward by the Government of British Columbia in 1978.[60]

However, since 1978, the concept of the equality of all provinces has taken on enhanced importance as evidenced more particularly by the terms of the amending formula in 1981 which *approaches* the concept of the equality of the provinces. The amending formula does not *fully* reflect equality of the provinces because the general formula requires seven provinces *having fifty per cent of the population of all the provinces.*

Equal Senate representation by province is a model that is much in current vogue. Advocates of the Triple E Senate propose it. The United States and Australia are put forward as shining examples. For reasons which follow, I do not propose equal Senate representation by province.

Whereas it may be relatively easy at the beginning of a nation's existence to develop a model which gives each of the constituent parts equal representation in the Upper House, in Canada with 123 years of a different model behind us, it may be unrealistic and unachievable to totally discard our past experience and substitute it for the equality model. An Upper House with equal representation from Ontario and Prince Edward Island is simply not likely to receive the requisite amount of support among governments to be achievable.

Instead, I would propose a basis of representation partially weighted by provincial population. This is the West German model. In that country, the largest Laender have five seats in the Upper House; the medium sized Laender have four seats and the smaller Laender have three seats. The Laender range in size from 18 million people to just under one million.

I would propose, therefore, that the Constitution should provide for representation in the

Senate of Canada based on the following sliding scale:

Any province having a population under 1,500,000	6 seats
Any province having a population between 1,500,000 and 4,000,000	8 seats
Any province having a population over 4,000,000	10 seats

Under this formulation, with the addition of two Senators from each of the territories, the Senate would have 76 seats with provision for increase in its membership as the population of provinces expand. The distribution of seats by Province and the population of those provinces would be as shown in the following Table:

Province	Population (000's)	Proposed Number of Senators	Number of Present Senators
Nfld.	573.0	6	6
P.E.I.	130.4	6	4
N.S.	891.6	6	10
N.B.	723.9	6	10
Que.	6,762.2	10	24
Ont.	9,731.2	10	24
Man.	1,089.9	6	6
Sask.	1,000.3	6	6
Alta.	2,469.8	8	6
B.C.	3,131.7	8	6
Yuk.	26.0	2	1
N.W.T.	54.0	2	1
Canada	26,584.0	76	104

June 1990
Source: Statistics Canada
Prepared by: BC Stats

This is significantly less than the 104 Senate which we now have. A smaller Senate has the added advantage of being acceptable to a citizenry wary of the growth of all government — federal or provincial, elected or bureaucratic. A Senate composed of 76 competent members would be large enough to undertake a significant volume of work and do it well and not be so large as to make the federal law-making process even more complex and cumbersome.

For those upset by the fact that this breakdown of seats would not make all provinces equal in representation, I would point out that this formulation *approaches* equality just as the amending formula for the Constitution approaches equality.

I would also stress that it is in addressing *intergovernmental* issues, through an institution at the centre where *governments* are represented, that provincial equality is required. It is in the Council of the Federation, proposed in the next section of this paper, where equality of representation is necessary. Such an institution should be considered as an integral and essential part of the reform of the central institutions of the federation.

c. *Powers of the Reformed Senate*

There is general agreement that the primary role of the Senate should be to bring the regional or provincial interest to bear in national law-making. A subsidiary role would be to continue its present function of "sober second look" and through its committees the consideration of broad policy issues.

As far as its powers are concerned, the Senate should continue to exercise the plenary powers which the Senate now has. The Senate should not have the power to introduce money bills; it should not be able to obstruct amendments to the Constitution; and a vote against a government bill or other initiative in the Senate should not constitute a vote of non-confidence in the government.

It can be expected that a reformed Senate along the lines proposed here would flex its muscles to a much greater extent than the present Senate because it would be viewed by itself and by the citizenry of Canada as a legitimately based institution. This might mean that there are times when a vote in the Senate would clearly go against the wishes of the government of the day as expressed in the House of Commons. There is no need to be unduly concerned about this eventuality. Frankly, it would be a much needed and refreshing element added to our law-making process at the national level. It would have the result of government resorting to greater and earlier consultation in an effort to seek consensus.

Moreover, in most federations, there are techniques to reconcile any major differences that may arise between the two Houses. In the United States and in Germany reconciliation committees are in place to deal with impasses when they arise. A similar technique should be adopted in Canada's case.

C. A Council of the Federation

1. The Development of Intergovernmental Relations

Given the relatively rudimentary means of travel and communications that existed in 1867, it is not surprising that the Fathers of Confederation, in framing our Constitution, saw little prospect of much intergovernmental activity between the far-flung constituent parts that were to comprise Canada. In their minds a division of powers within the Constitution, giving to each level of government specific subject matters over which they had exclusive legislative jurisdiction, was seen as the means by which federalism could effectively operate.[61]

Even after early decisions of the Privy Council gave full weight to the federal concept, it was felt that, in principle, the two levels of government in a federal system could be independent and co-ordinate, capable of carrying on their assigned responsibilities and exercising their powers free from direct influence or interference by the other. In theory there would be no need for any continuing intergovernmental interaction, or for joint policy and decision-making, or for the existence of a system of co-operation and co-ordination. The provisions of the *BNA Act* provided a comprehensive division of subject matters between the two levels of government but with no institutional mechanism, save the judiciary, to reconcile intergovernmental conflicts; to provide for joint decision-making in certain cases or to generally rationalize the activities of the two levels of government.

By 1937 Lord Atkin, of the Judicial Committee of the Privy Council, characterized constitutional power in Canada as being divided into "water tight" compartments, and thereby confirmed the earlier view that both levels of government would operate independently of one another.[62]

Not surprisingly, in more recent years the Canadian system has not developed in this manner. Canada has had to come to grips with the problem of divided jurisdictions, uncertainty over responsibilities and the need for co-ordinated joint action. No constitutional division of powers can ever be so precise and clear cut as to avoid all conflicts over jurisdiction. This factor, in addition to the growing interdependence of governments, has meant that the development of mechanisms of intergovernmental consultation has become extremely important to the efficient working of the Canadian political system. We must accept the inevitability and the advisability of interaction.

In fact, it is fair to say that, particularly since 1945, intergovernmental relations, and the use of the federal spending power in areas of provincial jurisdiction which it spawned, has become the predominant element in the operation of our federal system, and yet, as it has been since 1867, our Constitution remains void of any effective institutional mechanism to fully and systematically address this phenomenon.

This paper does not attempt to trace in detail the history of federal-provincial relations in Canada. From a British Columbia perspective, suffice it to say that as early as 1900 and 1903, the campaign for "better terms" for British Columbia within Confederation resulted in the Premier of the day leading a delegation to Ottawa to seek more favourable financial arrangements. The Province was largely dependent on the annual subsidy paid by Ottawa for a substantial part of its financial resources. The indisputable facts were that the provincial economy was contributing to the federal coffers far in excess of the federal payments to the Province and to a degree far greater than any other part of the country. Moreover, the high costs to the Province in providing services to its citizens because of physical characteristics, distance from commercial and industrial centres of eastern Canada, the high costs of British Columbia developing markets abroad for its products all combined to give the Province a convincing case. The provincial effort fell on deaf ears at the Federal-Provincial Conference in Ottawa in 1903.[63]

It remained for future Premiers to take up the theme that "British Columbia is a goblet to be drained" and to call for British Columbia's right to a "fair share". Recently an independent think tank in the Province released a study on the high costs of Confederation to this Province.[64] These grievances are rooted in 90 years of provincial dissatisfaction and discontent with federal-provincial arrangements. Their repetition makes the concerns no less valid.

A number of related developments have occurred over the past 40 years substantially altering the nature of Canadian federalism. In the first place, governments at both levels have expanded greatly their influence and involvement in the life of our citizenry, individual and corporate, through the establishment of a myriad of new programs perceived to be in response to "public demand." Secondly, major areas of government activity have emerged which were not contemplated by the framers of the Constitution, resulting in uncertainty as to which level of government has jurisdiction. This uncertainty has oftentimes resulted in both levels of government rushing to occupy the field. Some such examples are consumer protection, the regulation of the environment, cable television, offshore resources, the regulation of securities, etc. Thirdly, the problems facing government have become more complex and interrelated requiring comprehensive solutions by both orders of government. Finally, the country has "shrunk" in that modern means of transportation and communications have brought about more mobility among us and a greater ability to keep in touch with one another. For all these reasons, a much greater degree of intergovernmental co-ordination and interaction is inevitable and desirable.

The question arises as to whether the intergovernmental processes and institutions which have been utilized to date have been effective in meeting these dynamic forces.

Governments have equipped themselves in a variety of ways. Provincial governments, for the most part, have established ministries or offices of intergovernmental affairs to co-ordinate and ensure consistency within their government in their dealings with Ottawa. The federal government has done likewise. Many governments have ministers especially designated to carry their government's mandate into the intergovernmental arena.

Armed with these new instrumentalities, a plethora of federal-provincial meetings at all levels — first ministers, ministers, deputy ministers and senior officials — have emerged. Intergovernmental meetings now regularly take place in virtually every area of governmental activity. It is estimated that there are in excess of 500 such meetings each year. In many cases, ongoing administrative support for these meetings is provided by permanent secretariats.[65]

The sum total of this added element in our federal system has come to be known as "executive federalism". It finds its ultimate manifestation in the institution known as the First Ministers' Conference. Gordon Gibson considers that "the federal-provincial conference has grown into one of the monstrosities of Canadian politics; seeking to somehow fill the gap left by the existence of some operating body, such as the U.S. Senate."[66]

2. The Shortcomings of Executive Federalism

Those First Ministers' Conferences carried on national television become little more than media events. Set opening statements by First Ministers usually fill most of the first day's proceedings. While this media opportunity may be politically advantageous back home, it is a process that is rarely conducive to reaching agreement on complex federal-provincial issues. The dynamic is not so much a dialogue as it is eleven monologues. The discussions which follow are oftentimes unfocussed, unstructured and undisciplined. Not surprisingly firm agreements are seldom achieved. To use the U.N. parlance, the most that can be said is that there has been "a useful exchange of views". Sometimes the Communiques which are issued following such meetings are prepared in advance. When "agreements" are reached there is almost never any follow-up to monitor whether such agreements are complied with.

The name itself is instructive and reveals within it one of its chief defects. Because the process has no constitutional base and involves the *executives* of government, more often than not, the agreements reached in the process do not find their way into *legislative* change. The agreements are, therefore, nothing more than an expression of good intentions. Even these are inclined to dissipate in direct relation to the distance the political players travel homeward from the Conference centre in Ottawa wherein these solemn commitments are often made.

A case in point was a First Ministers' Conference which considered the federal government's public sector restraint program. The program had been in place for several months when the Prime Minister sought provincial moral support for its continuance. After due discussion, governments were unanimous in agreeing that the program should continue and should have continued provincial support. And yet, within a week, at least one of the Premiers was denouncing the program and doing his best to counteract it in his province.[67] Whether one supported or opposed that particular program is irrelevant. What is relevant is that the First Ministers' Conference as presently constituted is incapable of transforming its "solemn commitments" into law, because it has no constitutional base, nor are its decisions immune from the political pressures that may be brought to bear upon individual First Ministers by their home constituents to whom they are ultimately responsible.

Other defects in the present system of federal-provincial conferences is that, by virtue of the varying nature of the subject matters addressed, it is often unclear what the ground rules are that govern the outcomes. Some of the subjects may be wholly within federal jurisdiction. In such cases, although the federal government will not say so, such a conference amounts to little more than the federal government sharing information with the provinces as to what its intentions are, in a given program area. On the other hand, the provinces may be labouring under the impression that they have been called together to have some meaningful input in shaping the decision. The point can be best illustrated by example.

In 1982 the provinces pressed hard for a First Ministers' Conference on the Economy. In favouring this mechanism, the provinces "were arguing for consultation, collaboration, joint action and provincial input into national economic policies".[68] This notion applied as well to a discussion involving federal-provincial fiscal programs; matters which provinces considered to be subject to joint decision making. The federal government clearly viewed the conference differently. It was to be merely a consultation. Federal policies were firmly in place.

> *"At the conference, the premiers unanimously denounced federal fiscal and monetary policy, scrutinized Ottawa's plans for economic development and pushed for a compromise on its proposals for fiscal arrangements. They presented alternative policies in all three areas. The clash of views on the purpose of the conference and the topics of discussion made the conference manifestly unsuccessful. In their concluding statements, most of the premiers confessed that they were "disappointed" and "frustrated" with the results. British Columbia Premier William Bennett was disappointed that "we have signed no agreements, released no firm plans that would offer our people a range of solutions to their practical, every-day concerns."*
>
> *"Much of the premiers' collective frustration stemmed from the Federal government's attitude toward the conference. Premier Levesque called it a "dialogue of the deaf." Ontario Premier Davis, not noted for being an outspoken opponent of the Federal government, told the Prime Minister:*
>
> *'I guess my frustration really stems from what is more an attitudinal approach on the part of you, sir, and the government of Canada, an approach where I sense that minds were made up prior to our arrival in the nation's capital. When I see the press releases, when I listen to the statements made by the well intentioned ministers of the Crown . . . I sense that those points were not only inflexible and intransigent, but they were really, I guess, cast in stone. (First Ministers' Conference on the Economy, Verbatim Record, February 4, 1982, p.74)'*
>
> *To Premier Blakeney of Saskatchewan, Ottawa had deliberately precluded "that type of quasi-negotiation" where federal policies would be explained and ways sought of dovetailing them with provincial policies (Globe and Mail, February 5, 1982, p.9)."*[69]

At other federal-provincial meetings the subject matters may be truly of a concurrent nature, i.e., environment, agriculture, immigration, consumer affairs. Even here there is often a lack of understanding between the parties as to whether they are to share in the decisions that are reached. More often than not, federal initiatives are not at all designed to dovetail with provincial initiatives in areas where both levels of government have a constitutionally legitimate presence. Instead of harmonization of effort and a co-ordinated response between the two levels of government to a perceived public policy need, oftentimes overlap and duplication results, accompanied by ongoing frustration with the fact that the intergovernmental process simply does not work.

At the Annual Premiers' Conference, held in August 1982, the Premiers expressed dissatisfaction and frustration with the federal system. Premier Levesque claimed:

> *"What we find every time and even more so this year, is that our political system is creating problems rather than solving them. It is as if the federal system — or at least this one we have here — carried the germs of a permanently disabling disease and the systems were (sic) aggravated by its centralizing aims . . .*
>
> *A great many of our difficulties must be attributed to the inability of our federal system to devise original solutions that can accommodate the various provinces and their diversities. This inherent inflexibility in the system . . . means that in Canada today we have an unwieldy government of high costs and overlapping responsibilities that is almost totally unable to act in a co-ordinated and efficient manner. We no longer believe that the disease can be cured . . . (p.1,4)"* [70]

For the most part, the other Premiers concurred in Levesque's diagnosis, although they might not agree that the disease could not be cured. As will be seen, this Paper proposes radical surgery.

There is one further shortcoming of the present federal-provincial conference process that calls for reform. The control of such meetings is usually almost exclusively in federal government hands. "Control" means settling the agenda, deciding on meeting dates, designating the chairman, and even deciding whether or not such a meeting should be held in the first place. At the very least these matters should be arrived at by consensus among the parties themselves with the Canadian Intergovernmental Conference Secretariat — the closest we have to a truly transgovernmental body — given an expanded role that would cover this conference convener function. The Secretariat should also be mandated to perform a basic research role directed toward the issues on the agenda. As it is now, preparations among governments prior to conferences may be uneven leading to rigid and uninformed positions being developed and thereby making the achievement of compromise and consensus less likely.

3. A Model for The Council of the Federation

Given the obvious deficiencies in our intergovernmental machinery to adequately cope with what has emerged as a major element in our federal system, it is surprising that something substantive has not been done about it.

That there is a need for provincial government involvement in the formulation of federal policies of crucial concern to provinces seems to be increasingly recognized. The McDonald Royal Commission report states:

> *"Commissioners see considerable room for improvement in intergovernmental relations.* We accordingly recommend new institutions to manage interdependence. *We suggest the need for a more highly developed sense of constitutional co-existence and of comity, to moderate the excesses of rivalry and competition."* [71]

This auspicious prospect from this Commission for "new institutions to manage interdependence" regretfully does not materialize. The Commission only goes so far as to recommend that the Constitution be amended merely to require the holding of a First Ministers' Conference once a year. Even this timid adventure is accompanied with the caveat that decisions from such conferences must not be binding on governments. A provision that there simply be a First Ministers' Conference every year also found its way into the Meech Lake Accord. Such an anaemic response to addressing what is one of the most crucial problems facing the federation is a sad commentary on the resourcefulness and ingenuity of constitution-makers and other government visionaries. If intergovernmental mechanisms are good enough to keep, then they deserve some clout and some constitutional standing.

Members of the academic community, notably the late Donald Smiley and Professor Ronald Watts of Queens, have recognized the problem and the need to do something about it but are rather vague as to what would be the precise constitutional change necessary to effect the desired result.[72]

I propose the establishment in the Constitution of an institution to be known as The Council of the Federation. Such a body, in effect, would be a permanent federal-provincial forum designed to broker crucial federal-provincial issues specifically set out in the Constitution, and whose deliberations would be the first step in the initiation of legislation or other federal government action on those issues. The Council would be comprised as described and exercise the functions and responsibilities set out below:

1. The Council would be a body consisting of ministerial representatives of the federal and each provincial government.
2. Appointees would act on the direct instructions of the government they represent in deliberations within the Council.
3. Each of the eleven governments would have one vote on each matter coming before the Council.
4. For a vote to carry it would have to have the support of the Federal government and any seven provinces which, in the aggregate, have 50% of the population of all of the provinces.
5. The Council would be a *ratifying* body whose approval would be necessary before federal legislation is initiated, or appointments are made, as the case may be, in the following specific areas of authority assigned to the Council:
   - (a) Ratifying appointments proposed by the federal government to the Supreme Court of Canada.
   - (b) Ratifying appointments proposed by the federal government to major federal agencies and federal commissions.
   - (c) Approving the proposed enactment of federal laws to be administered by the provinces.
   - (d) Approving the proposed use of the spending power of Parliament in areas of provincial jurisdiction.
   - (e) Approving the proposed use of Parliament's declaratory power.
   - (f) Approving, in advance the intention of the federal government to enter into treaties in subject areas falling within provincial jurisdiction; the provinces with that approval thereby agreeing to their implementation.
   - (g) Ratifying the use of the emergency power, except in times of war.
   - (h) Being informed of the proposed enactment of legislation at both levels which, by the Constitution, is expressly said to be within concurrent jurisdiction.

It would be left to each individual government to decide who would constitute their representative on the Council. A logical appointee would be the Minister of Intergovernmental Relations for each of the provinces and the federal Minister in charge of federal-provincial relations. Depending on the subject matter before the Council at any given time, the membership could vary. There might even be occasions when the First Ministers themselves would sit on the Council. However, this would be unusual and should probably be discouraged. What the Council is designed to be is a permanent structure carrying on business in a methodical and workmanlike way without the hype and pressure-cooker atmosphere that accompanies most First Minister conferences. There would undoubtedly still be occasions when First Ministers might meet informally outside of the scope of the Council.

To elaborate further, members appointed would bring to their deliberations within the Council the direct instructions of their government on the issues to be addressed. This is unabashedly a Council with direct provincial government input at the centre but only on those specific subject matters specifically assigned to it.

Each of the eleven governments would have one vote. This is the forum in which the juridical equality of all the provinces needs to be expressed whether the province be P.E.I. or Ontario, in contrast to representation in the reformed Senate. In the Council, all provinces would be treated equally. In this respect, I accept the logic of the McDonald Commission Report when it states:

> *"Should each province, then, have equal representation in the Senate? We do not go so far: our objective is simply to establish a greater weight of influence for less populous regions relative to the more populous. In intergovernmental relations, provincial governments are, and should be, equal, a state which reflects their juridical equality and their responsibility for governing their respective provinces."* [73]

As to the number of votes necessary to carry a vote, it would seem that the measure of support necessary to bring about an amendment to the Constitution under the general amending formula would be the most appropriate. Under all conditions the approval of the federal government would be necessary, because most of the matters within the mandate of the Council are those which heretofore have been within the *unilateral* jurisdiction of the federal government. For reasons given elsewhere in this paper, I do not consider that voting on the Council would necessitate a special veto for the Province of Quebec.

Because the Council would act as a preratifying body to proposed federal legislative initiatives in the areas of authority assigned to it, over time this would likely have the effect of the federal government venturing upon early consultation and co-operation with the provinces on those subject areas. It would be expected, if this occurs, as is the case in the West German federation, that when matters actually reached the Council for a vote, a great deal of consultation would have already taken place.

As to the areas of authority assigned to the Council, the following comments are explanatory:

a. The Ratification of Appointments to the Supreme Court of Canada

The nomination by the federal government plus confirmation by the Council would have the advantage of allowing both levels of government to play a genuine role in the appointment process. With the judiciary now taking on a much more active role in social policy-making because of the Charter of Rights and Freedoms, and since the Supreme Court of Canada is the final arbiter of federal-provincial disputes, it would seem advisable for judicial appointments to be exposed to a ratification process.

b. Appointments to Major Federal Agencies and Federal Commissions

Prime examples would be the Bank of Canada, the National Energy Board, the Canadian Broadcasting Corporation, the Canadian Transport Commission, and the Canadian Radio and Telecommunications Commission, all of which are national institutions whose policies and decisions have immense impact on the economy and cultures of all the regions of Canada. The appointment of directors to these bodies should be ratified by the Council.

c. The Proposed Enactment of Federal Laws to be Administered by the Provinces

The criminal law is one of several subject areas in which the national government creates a law which the provinces are then called upon to administer. Some of the substantive criminal laws — particularly those recently enacted — impose significant obligations on the provincial Attorney General, the provincial police force and other provincial institutions. Examples are laws dealing with censorship, prostitution, drug offences, pari mutuel betting and horse racing, gun control, young offenders, and invasion of privacy. These require substantial provincial resources if they are to be properly administered. Obviously, therefore, the provinces have legitimate interests concerning the passage of such laws. They may have views concerning the sufficiency of their administrative apparatus to handle such matters. Their views should be effectively heard *before* the enactment of any new federal law, to be administered by the province, takes place. The Council of the Federation could provide this forum.

d. The Use of the Spending Power of Parliament in Areas of Provincial Jurisdiction

Although the federal Parliament has no constitutional power to regulate in a detailed way subjects such as health, social welfare and education, as these are largely matters within provincial jurisdiction, it has by virtue of its assumed spending power within the Constitution spent enormous sums of money over the past twenty-five years in encouraging the establishment of nation-wide programs in these subject areas.

Initially the federal government encouraged the provinces to establish such programs with the promise of a 50/50 cost sharing split with the provinces. The offer of 50 cent dollars proved irresistible to most provinces, even though, in some cases, provinces could not afford their portion of the expenditures nor were these programs necessarily in keeping with provincial priorities.

In 1977 the Established Programs Financing arrangement was instituted, replacing the earlier federal-provincial cost sharing mechanisms for financing medical care, hospital insurance and post secondary education. At that time the 50/50 formula was abandoned by the federal government replacing it with the federal contribution being tied to the annual increase in the gross national product. In subsequent years, the formula has been revised further to result in still less of a federal government contribution.

Because of strong expenditure growth in the health and post-secondary education areas, the federal government's share has declined precipitously so that in fiscal 90/91 the federal government's share to the province of British Columbia for these programs amounts to 39.1%. The recent federal budget indicates that the federal percentage of contribution in subsequent years will reduce still further.

This puts the provinces in a particular bind. The provinces deliver the programs and public expectations require that the programs continue. The withdrawal of federal funds comes about through the unilateral action of the federal government without, at least recently, even *consultation* with the provinces. At the same time as it is withdrawing its support, the federal government insists that these provincial programs cannot be supported by user fees.

On balance, the use of the spending power of Parliament has been beneficial in encouraging a uniform level of services nation-wide and in assisting provinces to mount important social programs they would have been unable to create on their own.

However, there is an obvious need for a mechanism that permits the federal government to only initiate shared costs programs in areas of provincial jurisdiction, or substantially alter the measure of federal contributions to existing programs, if there is widespread provincial support for doing so. The criticisms of the present system are well known and were acknowledged by the federal government as early as 1968 when the federal government proposed that these programs ought not to be entered into unless there was truly a "national consensus" determined by an affirmative vote of the Parliament of Canada and seven of the legislatures of the provinces.[74] This proposal was never acted upon.

Rather than that technique, this Paper proposes that the initiation of any new shared costs programs in areas of provincial jurisdiction or substantial alteration in federal funding of existing programs should be dealt with by the proposed Council of the Federation.

e. The Use of the Declaratory Power

Section 92(10)(c) of the Constitution permits Parliament to declare unilaterally that a work situate wholly within provincial boundaries and otherwise totally within provincial jurisdiction is one "for the general advantage of Canada or for the advantage of two or more of the provinces." The result is to render it subject to federal jurisdiction in the future.

The problem with this section is that, if used often (as historically it has been) and without provincial consent, it could result in the virtual suspension of the federal system. If Parliament wishes to declare oil wells, mines, grain elevators, universities, or many other provincially regulated industries or institutions to be works for the general advantage of Canada, then provincial jurisdiction would be ousted. Some have suggested that the declaratory power should be abolished. In the writer's view that would be a mistake but clearly there is a need for some constraint on what is now a unilateral federal power.

It is wrong for Parliament to be able to declare unilaterally, without taking into account provincial views, certain provincial works thereby making them subject to federal jurisdiction. It would be equally wrong for one province to be able to decide unilaterally that provincial works, under *no* circumstances, could be used for the general advantage of the whole country. Some middle ground is required. The Council of the Federation could be the meeting ground for reconciling the conflicting claims of national and provincial interests.

f. Treaties in Provincial Subject Areas

Although the federal government has the power to enter upon treaties, the current state of the law is that it does not have the power to implement treaties on subject areas within provincial jurisdiction. It can prove very embarrassing for the federal government, in furtherance of its international mandate, to enter into a treaty on a provincial subject only to find that provincial governments are reluctant to see to its implementation. This can be avoided, to the advantage of both the federal government and the provincial governments if these initiatives were first considered by the Council of the Federation.

One area of treaty-making in which the Council could play a role is on the subject of international trade policy. There can be significant interregional effects of international trade policy. Moreover with the general decline in the significance of tariffs in international trade, the measures dealt with in international trade treaties are increasingly non-tariff barriers. This means that, increasingly, policies of provincial governments will be up for negotiation — areas such as provincial liquor practices, government procurement, provincial securities legislation, the regulation of financial institutions, etc., will all be on the table.

If the provinces are going to be expected to implement these kind of matters, it would seem to require a more explicit role for them in preparing the Canadian bargaining position and in ratifying the final outcome. The Council of the Federation could perform this role.

g. The Use of the Emergency Power Except in Times of War

While there are no doubt instances when the federal executive must move and move quickly in the invocation of the emergency power, thus suspending the normal division of powers under the Constitution, there are a great many other times when it would seem highly desirable to first seek and obtain the concurrence of the provinces to the use of the emergency power. Again, this is a logical matter for consideration by the Council of the Federation.

h. Proposed Legislation in a Concurrent Field of Jurisdiction

Under the Constitution at the present time, there are only two specified areas of concurrent jurisdiction: immigration and agriculture. In the part of this paper which deals with the distribution of powers, it will be proposed that there should be other subject matters moved into the concurrent jurisdiction category. It is proposed that before legislation is initiated *by either level of government* in areas, which by the Constitution are expressly said to be subject matters of concurrence, that the Council of the Federation would be involved. It can be expected that the effect of this proposal would be to more harmonize government initiatives in these areas, and lessen duplication and overlap.

Summary

The matters identified above are of profound import to provincial governments as well as to the federal government. They are clearly definable and there ought to be little dispute as to what issues fall within those categories.

The overall effect of a Council of the Federation would be unifying to the country, by giving to the provinces more power, not in their provincial capitals, but in the national capital. The end result will be to strengthen the federation: to give it much needed systematic intergovernmental decision-making in the full meaning of the term and thus to effectively deal with a major element of contemporary federalism that, to date, the Constitution of Canada neglects.

D. The Division of Powers

1. Introduction

As is the case in most federations, the Constitution sets out the subject matters on which each level of government has the power to make laws. In Canada's case these legislative powers are set out in sections 91, 92, 93 and 95 of the *Constitution Act, 1867*, supplemented by several amendments made since that time. The concept is that the totality of powers — present and future — is assigned to one or other government and that each government has the exclusive power to legislate on those matters subject, of course, to the provisions of the Charter of Rights which circumscribes the powers of both levels of government. The proprietary rights (debts, assets and natural resources) of the two levels of government are spelled out in sections 102 to 117 and in the Third Schedule of the Act.

Without question, it was the intention of the Fathers of Confederation to devise these arrangements in such a way as to make the central government dominant, with the Provinces exercising strictly local — almost municipal-like powers — with provisions in the Constitution to give to the federal government substantial powers of supervision over the activities of the provinces.

Notwithstanding what may have been the original intention, our Constitution has been interpreted by the judiciary (particularly through appeals to the Judicial Committee of the Privy Council, up to 1949,) so as to considerably expand provincial legislative powers at the expense of federal powers. Successive federal governments have, however, effectively put a break on this trend through the use of the federal spending power in areas of provincial jurisdiction. This technique is discussed earlier in this paper.

I believe that the liberal judicial interpretation of the Constitution leading to larger provincial powers was a positive and necessary development to meet the needs of a far-flung country with little homogeneity and very diverse regional needs.

Up to about 1945, the Privy Council espoused two constitutional doctrines of interpretation that were sufficient, up to that time, to meet the needs of a relatively static federalism. First, "the water-tight compartment" theory of legislative jurisdiction, discussed at page 35, and the "living tree" theory of the Constitution which holds that the Constitution is a dynamic instrument capable of adapting to new subject matters not within anyone's contemplation in 1867.

Just as the "water-tight compartment" theory has been swamped by the deluge of intermingling policies, programs and legislation of both levels of government, so too is the "living tree" theory becoming more and more outdated.

As I said in 1982:

> "*We must reassess the principle on which the division of power is based and consider whether a large and diverse country such as Canada can and should be governed to such an extent by the central government. We need to update a division of powers that was written before the invention of the automobile or the airplane, to say nothing of communications satellites, compute technology and the discovery of off-shore resources.*
>
> *The living-tree theory of the constitution, which holds that the written constitution is capable of being interpreted and continuously adapted to new conditions and new ideas, is breaking down. The tree is in danger of becoming a bramble bush with too much duplication, overlapping jurisdiction and parallel bureaucracy at both levels of government on the same subject matter.*"[78]

The "bramble bush" is badly in need of pruning, (to lessen government, duplication, overlap and inefficiency) and, in the interests of meeting contemporary needs within the federation, some measure of transplanting (from one level of government to another).

2. Principles

A distribution of powers in a constitution cannot be made in the abstract. Rather there must be an underlying philosophy or unifying theme in a country from which a logical distribution of powers can flow. In a democracy there are, of course, the traditional themes of majority rule and protection of the individual from arbitrary government action. In the Canadian federal system there are three general principles which are essential and serve as starting points for any review of the distribution of powers. These are:

a. The need to strike an appropriate balance between *factors of unity* and *factors of diversity* in Canadian national life;
b. Benefit sharing;
c. Efficiency.

a. Balancing Factors of Unity and Diversity

A federal system of government is chosen by a country because of a recognition by the constitution-makers of the day that there are present in the society both *factors of unity* and *factors of diversity* which must be respected in the political arrangement. Canada was in 1867, and is today, no exception to this general rule. There are a number of areas in which all Canadians have similar interests and aspirations. In these areas, either because of the importance of the subject matter or the lack of divergence of provincial, group or individual interests, national jurisdiction is appropriate. Equally, there were in 1867 important matters concerning which there was no national consensus or overriding national interest. Many of these items of diversity, and some new ones, continue to prevail in 1991 — a fact which augers for strong provincial governments exercising these important powers.

The allocation of a specific power to a particular level of government flows logically from a decision whether that power is of substantial importance to the whole country, in which case it would be assigned to the federal government, or of differing significance to the various regions of the country, in which case assignment to the provinces would follow. The factors of unity existing in Canada flow from our feelings of *nationalism* — our strong sense of a clearly definable, unhyphenated Canadian identity. Canadian factors of diversity, on the other hand, are derived from a separate strain of national life, namely *regionalism*.

(i) Nationalism

It is clear that in 1867 there were enough similarities in the various regional social fabrics and individual aspirations to justify the creation of a strong central government. There was a definite sense of military insecurity in the Canadian colonies in the 1860's and this highlighted the need for a strong national government capable of providing for common defence. There was also the hope that union would be to the economic advantage of all the federating provinces. Nova Scotia, New Brunswick and, to some extent, Quebec had resource based economies which could provide raw materials to the manufacturing plants of Ontario. Ontario in turn could then send its finished products back to the Maritime market. When the four western provinces joined Confederation, or were created, hopes were entertained for similar economic advantages. A third reason for union was a commonly felt desire by most Canadians to be independent of foreign powers. French Canadians in particular hoped that in a separate country their interests would be better represented than in a colony subject to British rule. And English Canadians, not because of any anti-British feeling, but rather as a natural out-growth of increased maturity and self-reliance, felt prepared to govern themselves.

Because of these unifying factors, many of the great powers of government were granted by section 91 of the *BNA Act* to the federal government. These include foreign affairs, national defence and major economic, commercial and taxation powers.

The factors which bound Canadians together in 1867 still exist and, in some respects, have strengthened. In addition to the military security and economic advantages provided by nationhood, we now have a collective history of 123 years. Our social and political institutions, literature, art, culture, economy, athletics — indeed every facet of our life — have grown to maturity under the umbrella of Canadian nationhood. To the unifying factors that were present in 1867, we now can add *a shared history* as participants in a great national enterprise. Accordingly, it is appropriate, as we now reassess the distribution of powers, to conclude that the continuation of a strong national government, is still appropriate.

(ii) Regionalism

In spite of the growth of nationalism in Canada over the last century, it is still true that Canadians are dissimilar in many important respects. Different historical backgrounds, languages, cultures, legal systems, social institutions and economic interests — these and other factors require a governmental system that is not monolithic or overly centralized. We do not resemble the homogenous American "melting pot," an important fact which must be reflected in our governmental structure.

Many of the differences mentioned above fall along regional lines. To take but one example — economic interests — the Atlantic provinces share a common ocean orientation (including a heavy dependence on fisheries), and similar levels of economic activity. Quebec and Ontario, as the powerful inland halves of central Canada, share common interests arising from their strong agricultural, resource and manufacturing sectors. However, their interests conflict at times even on these issues. The common resource, grain, of the

Prairie provinces, and petroleum resources of Alberta and Saskatchewan, leads to shared views on transportation and trade policies and to a concern with diversifying their narrow resource base. British Columbia's regional dimension is the subject of Chapter I. of this paper.

These regional diversities in economic interests are paralleled in many other important facets of our national life such as literature, culture, religion, and social institutions and customs. In addition, there is strong evidence that Canadians living in Canada's five regions view themselves as members of a particular regional community: regionalism in Canada is both a psychological and sociological fact of life.

The division of powers must recognize the importance of regional diversities in our country. In relation to those subject matters in which these differences appear, it is essential that the distribution of powers be structured so as to permit different regional responses.

b. Benefit Sharing

Canada is one of the largest and richest countries in the world. Yet, not surprisingly, the natural resources and economic advantages that are Canada's have not been spread evenly throughout the country's five regions.

The hope of mutual economic advantage was a prime motivating force behind the union of the original provinces and the subsequent entry into Confederation of the other six provinces. This goal was and still is a worthy one and, although in part it has been fulfilled, there remains much to do to ensure that the benefits of the Canadian economy are shared by all Canadians.

In this regard British Columbia, through the commitment to equalization contained in the patriation package of 1981, affirmed its continuing attachment to the concept of equality of opportunity and well-being for all *individuals* wherever they may be in Canada, and the assurance, as far as possible, that essential public services of reasonable quality be available to all individuals in Canada. In practice, the federal government has to take primary responsibility in achieving this goal.

c. Efficiency

One of the major problems of our national life is the inefficient provision of services by governments to the public. There are two reasons for the vast amounts of duplication and overlap that characterize Canadian Government today. First, in a number of important areas, there is a lack of clarity in the present distribution of powers as to which level of government has jurisdiction. Secondly, even if the distribution of powers in the Constitution is clear, the aggressive attitude of governments to expand the limits of their own jurisdiction have resulted in much duplication and overlap. More will be said about this in Chapter IV. of this Paper.

These problems must be overcome. One way of doing this is by the acceptance in a new distribution of powers of the concept of *efficiency* as a fundamental principle. Subject matters should be identified accurately and then assigned clearly on the basis of which level of government can legislate in that area both more effectively and less expensively.

In summary, a reassessment of the distribution of powers should flow from the four starting points of nationalism, regionalism, benefit sharing, and efficiency. The first two are *facts* of our national life, the latter two are essential *goals* of nationhood — together they provide the key to an effective evaluation of our existing distribution of powers.

3. Special Status for Quebec

No consideration of changes to the distribution of powers can be undertaken in the present Canadian context without addressing the issue of special status for Quebec. The concept has taken on another label in the current constitutional lexicon: "asymmetrical federalism". Its proponents advocate that, in order to meet the present demands of the province of Quebec, the division of powers should be overhauled so as to transfer from federal jurisdiction, and give to Quebec alone, a substantial number of new powers. Taken to the extreme, as the Allaire report does, it would leave Ottawa, in its dealings with Quebec, the defence power, some aspects of foreign affairs, custom duties and little more. Ottawa would continue to legislate for the *rest* of Canada to the same extent that it now does. The concept is not particularly new in that it has been proposed by Quebec nationalists in various forms since the time of Quebec Premier Lesage who took power in 1960.

The concept of special status for one constituent unit is generally considered to be contrary to the classical definition of federalism which assumes a formal and consistent relationship between the central authority and its constituent parts. Efforts to increase the degree of asymmetry, or special status for Quebec, by the distinct society clause in the Meech Lake Accord, failed and this issue was perhaps the greatest reason for the Accord's failure. As is stated earlier in this paper, the concept of the equality of provinces is strongly held among provinces and their peoples and the prospects for a radically asymmetrical model, in the juridical sense, to meet Quebec's demands are not likely achievable or desirable. In a recent Macleans' Decima Poll, 74% of Canadians outside of Quebec rejected the idea of a new Constitution which would give special powers to Quebec only. The poll shows that the willingness of Canadians outside Quebec to resume negotiations increased dramatically if their provinces, too, would receive the same powers as those to be given to Quebec.[76]

Other considerations need to be taken into account before dismissing the concept of special status out of hand. The essential question is whether a significant number of constitutional reforms desired by the more federalist elements in Quebec can be achieved without raising the spectre of special status for Quebec. I think they can.

Successive Quebec Governments seem to insist on resting their case for more powers on a claim to special status. In my view, a better argument for more powers, and one that would be more acceptable to the rest of Canada, is one based, not on Quebec's perceived need to protect language and culture, but rather on contemporary realities of a different dimension in Quebec. The enormous changes that have taken place in all facets of life in that province and its institutions over the past 30 years — be it the areas of commerce, industry, education, religion, culture — calls for a significant shift in constitutional powers to give to Quebec greater control over its own affairs. But the same can be said of other provinces as well. For Quebec to press their claim for more powers in this way and thereby embrace other provinces of like mind, would make the prospects for success much greater. To press for more powers on a claim based on special status is to be insular in approach and is not likely to attract the support of other provinces which, under the amending formula, is necessary to bring about constitutional change.

To base the demand for future constitutional arrangements in Canada on the concept of two "founding nations," and thus leading to special status for Quebec, is to follow a model that many would argue:

(a) rests on a dubious historical base;

(b) has less and less meaning to more and more Canadians;

(c) ignores the protections already provided to Quebec by present constitutional and non-constitutional arrangements, and

(d) is unnecessary to support Quebec's (and other provinces') demands for more powers.

(a) Historical View

Historians are divided into no less than five different camps in conceptualizing the nature of the federation agreement entered into in 1867. These concepts are, the centralist concept; the administrative concept; the co-ordinate concept; the compact theory and the dualist concept.[77]

Proponents of the dualist concept, hold to the view that Confederation comprises two races, two linguistic groups and two cultures — English and French — to whose welfare Confederation should be primarily dedicated. The clearest early articulation of this concept of federalism was the 1956 (Quebec) Royal Commission of Inquiry on Constitutional Problems. This dualist concept finds it full expression in the concept of special status for Quebec.

I hold the view that, while Confederation is an amalgam of several of these concepts, above all it is a union of provinces — each one bringing to the federation its own strengths and weaknesses.

One of Canada's leading historians describes Confederation in these terms:

> *"The primary aim of Confederation was political — the creation of a great "new nationality"; and the* British North America Act *was the result of a political agreement among several provinces, not of a cultural compact of two ethnic groups, English and French. Before 1867, British America still remained, and was still regarded, not as a cultural duality but, in the words of George Cartier, as "a diversity of races." "In our own federation," Cartier declared, "we should have Catholic and Protestant, English, French, Irish, and Scotch, and each by his efforts and his success would increase the prosperity and glory of the new confederacy." Language was only one of the many components that made up the curious cultural medley that was British America before Confederation. National origin and national tradition — Irish, Scotch, and English, as well as French — might be equally influential, and religion, often sharpened by sectarian bitterness, was perhaps the most important of all.*
>
> *The Fathers of Confederation had to take account of these differences; but their great aim was not the perpetuation of cultural diversity but the establishment of a united nation. At the Quebec and London conferences they gave, on the whole, relatively little time to the discussion of ethnic and cultural questions; and the resolutions they adopted on these matters, though important and essential, were few, precise in their wording, and limited in their scope.*
>
> *The* British North America Act *contained no general declaration of principle that Canada was to be a bilingual and bicultural nation — or, for that matter, that it would remain a diversity of races. The Fathers of Confederation were as little inclined to lay down the law about the cultural purpose and future of their new nation as they were to issue a general pronouncement on the nature and probable destiny of mankind."*[78]

(b) Canadian duality — Irrelevant to more and more Canadians

The view, ever popular in central Canada, that so called "French Canada" and "English Canada" are the crucial and compelling characteristics of Canada requiring paramount consideration and by which all proposals for constitutional reform must be measured, is to ignore contemporary Canadian realities.

Although written 10 years ago, the comments of the Canada West Task Force report bear even greater meaning today:

> *"This is simply the latest form of one of Canada's enduring political myths: the notion that the only reason that there is any need for this country to be federal is the existence of the province of Quebec with its Francophone majority. This myth is based upon a particle of truth — namely the fact that Confederation was born out of the political deadlock that resulted from the attempt to combine Upper and Lower Canada within a single unitary political entity. But if Quebec remains in some sense the logical successor to Lower Canada, the logical successor to Upper Canada is the province of Ontario and* not *all the rest of*

> *the country. The Canada of 1867 is not the Canada of 1981; the problems that led to the creation of this country are not identical with those that demand attention today . . .*
>
> *The myth of linguistic regionalism is the most dangerous myth in Canadian politics, and one that carries in its train two implications with extremely dangerous overtones. On the one hand, such a conceptualization concedes in advance the uniqueness and distinctiveness of Francophone Quebec, and sets it permanently apart from the other political units of Canada. On the other hand, it defines out of existence the grievances and concerns that grow out of political territories less inclusive than the arbitrary and polyglot "English Canada," subsuming under the medium of language all the other problems that preoccupy Canadians today.*
>
> *If there is one factor that threatens the future of Canada, it is the attitude of Central Canadian pundits and politicians with their Ontario-centered view of Canadian history and politics. The Parliament Buildings in Ottawa stand on the edge of Ontario and gaze over the river at Quebec. This description can become all too symbolic of a vision of Canada that stretches all the way from the University of* Western *Ontario to the* Eastern *Townships.*"[79]

In his authoritative work published in 1980, Donald Smiley in a sober look at Canada's future argued "that there is an adequate foundation for a renewed political community in Canada only if two conditions are met." One being a return to Cartier's vision of a political nationality not based on culture or ethnicity. He concludes that:

> *"The formulation of the Canadian Confederation primarily or even exclusively in cultural/ethnic terms is inherently divisive and in the long run destructive of Canada.*"[80]

The changing nature of the Canadian mosaic and its effect on the two founding nations theory is well stated by two observers of Canadian federalism:

> *As multiculturalism gains strength (both by sheer dint of numbers and by constitutional enshrinement) it challenges, at least implicitly, the concept of the two founding "nations" and linguistic duality. Sally Weaver (1990) has noted that the notion of two founding peoples or nations is not only increasingly "intellectually hostile" to the emerging ethnic plurality of Canada, let alone to the "first nations," but as well stands in the way of conceptualizing Canadian society accurately and realistically as a first step toward rethinking our future.*"[81]

If the country is to embark upon a fresh assessment of the kind of constitution that will be necessary to take us into the 21st century, the presuppositions on which the old Canada was based will have to come under scrutiny and, in some cases, be discarded, in the light of the realities of contemporary Canada and future directions. Demographic trends no longer support future constitutional reforms being put to the less and less relevant litmus test of linguistic and cultural duality.

(c) Special status in existing constitutional and non constitutional arrangements

A careful examination shows that the province of Quebec already possesses a substantial range of constitutional powers, guarantees, special programs, arrangements and practices that sets it apart from those enjoyed by the other provinces of Canada. Consider the following:

- Section 133 of the *Constitution Act, 1867*, constitutionally protects the French and English languages in the Legislature and Courts of Quebec;
- Sections 23 (5) and Section 80 of the *Constitution Act, 1867*, which were directed toward guaranteeing the membership of English and French in the Senate of Canada and the Legislative Assembly of Quebec;
- Section 93 of the *Constitution Act, 1867*, protecting the educational rights of denominational minorities has particu-

lar, but not exclusive, application in the Province of Quebec;

- the right of the Province of Quebec to have its own civil code;
- the imposition on all other provinces, except Quebec, by section 23 (1) of the Charter of Rights, to extend minority language education rights to the children whose parents have been educated in the minority official language;
- the *Supreme Court Act of Canada* which requires that 3 of the 9 Judges be from Quebec.

On non-constitutional matters, bilateral relations between Ottawa and the Province of Quebec since the early 1960's have resulted in the following. Donald Smiley states:

- Quebec alone collects its own taxes on individual incomes;
- Quebec alone contracted out of several grant-in-aid programs under Parliament's *Established Programs (interim Arrangements) Act* of 1965;
- Quebec alone controls its plan for contributory retirement pensions, while citizens elsewhere in Canada are under the Canada Pension Plan;
- Quebec alone administers its own program of government-guaranteed bank loans to students in post-secondary institutions, while elsewhere a federal scheme is in effect;
- Quebec and Ottawa have relations in respect to immigrants that have no counterparts in the other provinces; (More will be said about this later in this Paper.),
- Quebec alone has made special arrangements for distributing federal family-allowance payments;
- Quebec has a unique role in international francophone matters.[82]

At the same time Quebec has acquired important elements of a *de facto* special status; it has become more powerful than ever before in the affairs of the central government.

> *"To take specific examples, the Minister of National Health and Welfare is responsible to Parliament for the Canada Pension Plan, but no one seems to have asked whether it was appropriate for Marc Lalonde and Monique Begin to hold that portfolio recently because the Canada Pension Plan is not in force in Quebec. In 1978 some 25.2 per cent of the employees in the Department of National Revenue were francophones. (This figure is to be compared with their service-wide average of 26.2 per cent.), although the relationship of the Department to Quebec is unique in that the province collects its own taxes on individual incomes."* [83]

In listing those constitutional provisions and other arrangements that place Quebec in a position of special status, it is also useful to list those other provisions contained in the Constitution which protect the French language in the nation's capital and in other parts of the country. This is relevant to Quebec because, presumably, to strengthen the use of the French language in Ottawa and in other parts of Canada is to have a positive, albeit a tangential effect, on strengthening that language within Quebec. These provisions include the language provisions in the Charter of Rights which are set out in full at pages 17 and 18 of this Paper.

In addition,

- Section 133 of the *Constitution Act, 1867*, also gives constitutional protection for the use of the French language in the Parliament of Canada and in the courts established by the Government of Canada (i.e., Supreme Court of Canada and the Federal court.)
- the requirement in federal law to provide criminal trials in all provinces, including British Columbia, in the official language of the accused's choice;
- the *Manitoba Act* provides that both French and English can be used in the

Legislature of Manitoba and in the courts of Manitoba;

- the requirement in federal legislation for bilingual labelling in all products sold in any part of Canada;
- the increasing designation in the Public Service of Canada of bilingual positions which, by the nature of things, makes the positions more easily available to francophones in Quebec than anglophones in the west;
- the Canadian Broadcasting system which has a French and English network; and
- the tendency of a disproportionately large percentage of francophones staffing major federal boards and commissions.

It is important to also mention the extent to which the Constitution's amending formula protects Quebec from having its constitutional powers removed against its will. Section 41 (c) of the amending formula requires the approval of Quebec before any changes to the Constitution can be made on the subject of the English or the French language. Once the Supreme Court is constitutionalized, section 41 (d) prevents the composition of the Court from being altered without Quebec's approval. Finally, the provision of section 40 which gives fiscal compensation to provinces who opt out of constitutional amendments related "to education or other cultural matters" was particularly tailored for Quebec.

All of this would seem to suggest that the question is not so much whether the rest of Canada will now agree to special status for Quebec. The special provisions and arrangements described above have already achieved a substantial measure of special status for Quebec. The real question is whether special status for Quebec should be extended still further.

The extent to which the Province of Quebec can go in its effort to maintain French as the dominant language in Quebec society, business and commerce, as evidenced by its recently enacted sign law, is indicative of the broad range of that province's powers on language matters within the present constitutional arrangements.

Moreover, recent demographic studies undertaken in Quebec show that, far from the French language being under seige and in decline in Quebec the very opposite is the case and it is predicted the trend will continue well into the 21st century.[84]

As Canada's late celebrated literary scholar said last year:

> *"Meanwhile the language and culture of French Canada is in flourishing shape, in no danger except when politicians refuse to leave it alone. Culture and language are an area — perhaps the only area — where privatization really does work."* [85]

It is my view that the existing constitutional arrangements, including those enacted in 1981, have proved fully adequate to protect and indeed to promote the French language primarily, but not exclusively, in Quebec and in the nation's capital. One has to seriously question the validity of any claim for still more special status for Quebec which is based on the argument that the French language and culture lack protection.

(d) More Powers to all Provinces Equally

This is not to say that there is not a good and valid argument for Quebec receiving more constitutional powers than it now has. There is, but it is a claim based on the principles set out in the earlier part of this chapter and it is a claim which can be equally advanced by several other provinces.

4. The Achievable Options

If special status for Quebec for the purpose of the realignment of the division of powers is unacceptable and unachievable, as I suspect it is, what viable and achievable options remain?

Ruling out the *status quo* option as likewise unacceptable, the remaining options are:

(a) decentralization of powers to all provinces;
(b) delegation of powers;
(c) concurrency with provincial paramountcy;
(d) a segmentation of subject matters.

(a) Decentralization of Powers to all Provinces

This option involves the transfer of legislative powers, over the subject-matters agreed to, from the Parliament of Canada to the Legislatures of *all* the Provinces. It preserves the principle of the equality of the Provinces, and as aptly summarized by Professor Leslie, has the following advantages:

> *"The arguments for decentralization are (a) that when government is "closer to the people" it is more responsive and more democratic; (b) that decentralization permits, within a regionally diverse country, adaptation of policy to local/regional needs, thus permitting the satisfaction of a higher percentage of the people's needs/wants; (c) that decentralized government is more efficient, partly because it permits more policy experimentation, and (d) a reduction in federal responsibilities and activities would reduce tensions and conflicts within the federation."* [86]

In the current context of debate within Canada, it has some decided disadvantages. Chief among them is that the long shopping list of legislative powers sought to be decentralized, by at least the more aggressive elements in Quebec, would, if granted, likely cripple the national government in the exercise of powers necessary to maintain our nationhood. The Allaire Report of the Quebec Liberal Party is a clear example of this. Stripping the federal government's exclusive powers in relation to Quebec to four: defence, customs and tariffs, currency and common debt, and equalization, is not federalism. Such an extreme position should be rejected out of hand. Radical surgery may be necessary to our federal system but evisceration goes too far.

Another reason which stands in the way of massive decentralization is that some of the Provinces, who would stand to gain major additional legislative powers, may simply not wish to have them. The smallest and economically less strong provinces within the federation, as a general proposition, are not likely to want to be saddled with greatly expanded constitutional responsibility. With relatively small provincial tax bases, it may well be that it is all these provinces can do to discharge their *existing* constitutional responsibilities and even that may only be achieved by large fiscal transfers, including equalization payments, from Ottawa.

A recent example of this dichotomy occurred during the Meech Lake round. While the more wealthy provinces (Ontario, Quebec, Alberta and British Columbia) supported the formulation for imposing constraints on the exercise of the federal spending power in areas of provincial jurisdiction, some of the less wealthy provinces were much less enthusiastic about such a constraint. Newfoundland opposed it outright on principle. These latter provinces depend to a greater degree on these fiscal transfers.

The great disparity in size and economic strength among the provinces makes uniform federal solutions to many of the country's problems almost impossible. In his own way, Premier W.A.C. Bennett was among the first to propose a solution to the problem. He recognized that, given the structure of federal institutions, it was virtually impossible for provinces of disparate strength to be effectively and evenly treated in their dealings with Ottawa. He held the view that federal-provincial relations would not work well as long as the federal government could play the wealthy provinces off against the weaker ones. At the First Minister's Conference of February 1969, he proposed, complete with map, a 5 province Canada consisting of the Atlantic Region, comprising what are now the four Atlantic provinces; Quebec; Ontario; the Prairie Region, comprising what are now Manitoba, Saskatchewan and Alberta; and the Pacific Region, comprising British Columbia and the Yukon.[87]

Although generally derided by the vested interests of the day, the idea spawned the holding of the One Prairie Province Conference in Lethbridge, Alberta, in 1970. There the idea was seriously discussed among a representative group of politicians, academics and other opinion-makers of western Canada.[88]

In the Maritimes, in March 1968, the Premiers of New Brunswick, Nova Scotia and Prince Edward Island agreed to sponsor a special study on maritime union including the possibilities for economic and other forms of regional co-ordination and co-operation. In his report, Dr. J.J. Deutsch identified certain governmental activities that could be cooperatively undertaken among the three governments and proposed the establishment of the Council of Maritime Premiers and a Joint Legislative Assembly comprising all the members of the three provincial legislatures meeting once a year in joint session.[89]

The Council of Maritime Premiers, but not the Joint Legislative Assembly, was subsequently established with a view to coordinating and rationalizing public policy among the maritime provinces, on a range of issues common to that region. The Council has recently celebrated its 20th anniversary.

While a greater degree of economic cooperation within the region is considered possible, government leaders of the day are generally opposed to political union although the idea was seriously addressed by one of Canada's leading scholars at a recent workshop of the C. D. Howe Institute under the heading, "Organizing for Symmetry and Asymmetry." Premier Wells of Newfoundland has also recently come out in favour of a fresh consideration of maritime union which could include Newfoundland.[90]

Although *massive* decentralization of powers would not be in the best interests of Canada's survival as a nation and may well prove to be unattractive to several of the provinces, this does not rule out *some* significant degree of decentralization of powers to the provinces. In my view, it is essential to meet contemporary Canadian needs. What subject matters should be included and whether the reallocation of power in those cases should give the provinces exclusive or shared legislative jurisdiction will be discussed at greater length below.

(b) Delegation of Powers

A part of the Fulton/Favreau proposals of 1964 was an intergovernmental technique to "transfer" legislative powers from one level of government to another without the necessity of a formal amendment to the Constitution.[91] The provision permitted four or more provinces to authorize Parliament to enact specific laws under certain heads of provincial jurisdiction: section 92 (6), (20), (13) and (16), and similarly permit Parliament to authorize four or more provinces to enact specific laws that would otherwise be under federal jurisdiction. Because this technique to "transfer" legislative power would be by way of delegation and not constitutional amendment, the government delegating the power always would have the right to retrieve it at any future date.

In the current context, for those provinces adamant on obtaining substantial additional powers, it is not likely that the technique of the delegation of powers would prove to be sufficient. Nonetheless, the idea should be explored further, including a provision that the delegated power would not be withdrawn unless a reasonably lengthy period of notice were first given.

(c) Concurrency with Provincial Paramountcy

In the current impasse between the need to have juridical equality among the provinces, on the one hand, and yet the need to allow those provinces that wish to do so to exercise greater legislative powers, the key may be found *in concurrency with provincial paramountcy*. In a recent paper, Professor David Milne states the dilemma:

> "*How to provide for sufficient asymmetry* in practice *so that Quebec may consider staying in the federation, while not offending English Canadians' resistance to formalizing inequality*?" [92]

In his view, concurrent jurisdiction with provincial paramountcy is the answer.

For reasons which are set out below, I concur, provided the Council of the Federation, proposed in the last chapter, is established and given a meaningful role to play in assuring that duplication of efforts by government is minimized.

In the present Constitution only three subject matters are expressly stated to be of concurrent jurisdiction: agriculture, immigration and old age pensions. Concurrency means that both levels of government may legislate on a subject. On the first two the Constitution provides that there is federal paramountcy, meaning that although both levels of government have power to legislate on the subject, if there is any repugnancy or clash in the application of those laws, then the federal law prevails. In the case of old age pensions, there is provincial paramountcy which means that, although both levels of government have the power to provide old age pensions, the federal exercise of that power may not affect the operation of any provincial law on the subject.

Concurrency does not *compel* a province to exercise any new legislative power given to it, and in a federation such as ours where the provinces are unequal in economic and fiscal strength, that is most important. For if a number of powers which are now exclusively federal, were transferred into the concurrent category although Quebec and British Columbia, say, might exercise their newly given power, there would be no obligation on other provinces to do so if they were not so inclined. The genius of the idea is that *de jure* equality is preserved in the Constitution and yet the exercise of jurisdiction by the constituent parts of the federation would vary and would be determined by the practical and political desire of provinces to exercise those powers.

The element of provincial paramountcy attached to concurrency assures that the provincial government, rather than the federal government, has the last word: provincial legislation would prevail over federal legislation if they were in conflict. This would be viewed as particularly important to the province of Quebec.

Critics of concurrent jurisdiction argue that concurrency promotes duplication of effort by both levels of government. This is a danger but it need not necessarily be the result. As has been said, some governments will not choose to legislate at all. Others who do so must be made conscious of the need to harmonize their legislative and policy activity in a particular area of concurrent jurisdiction with that of the other level of government. As has been discussed, the proposed Council of the Federation could effectively discharge this role.

Another criticism that will be advanced is that Members of Parliament from provinces which have assumed greater jurisdiction on certain subject areas, ought not to have the right to vote on federal measures on subject matters that have application in other provinces but not in their own. This concern may prove to be more theoretical than practical. Smiley points out the measure of *de facto* special status which we have at the present time has not caused this problem.[93] Inasmuch as, at the very least, 4 or 5 provinces could be expected to exercise power under a scheme of concurrent jurisdiction and that the mix of powers that would be exercised by the various provinces in this way might vary from subject to subject, it is not likely that a serious imbalance would arise in this regard.

(d) A "Segmentation" of Subject Matters

As has been pointed out above, a revision of the distribution of powers to provide to both levels of government concurrent powers does run the risk of governments duplicating each others efforts thus resulting in costly inefficiencies. As is suggested, these undesirable results could be minimized through the efforts of the Council of the Federation and, in the final analysis, the political will of both levels of government to avoid duplication and otherwise be resolved to make the system work.

There is a further refinement that could be added to our constitution-making that would lessen the risk of overlap and duplication. That is, for the constitutional draftsmen to use more precise language in assigning legislative powers than the Fathers of Confederation did in setting out sections 91 and 92 of the *BNA Act, 1867*. General terms such as "Property and Civil Rights", "Matters of a Local and Private Nature" and "Regulation of Trade and Commerce" are so broad and susceptible of any number of interpretations as to be unhelpful in indicating clearly to either level of government what is the scope and limits of their constitutional power. Such general terms have kept constitutional lawyers in and out of Courts for 123 years in an effort to have jurisprudence guide the way.

This general terminology has encouraged the level of duplication and overlap which exists in the present system because, like Aesop's fable of the elephant and the blind men, each level of government attaches a meaning to these general terms which justifies to each of them a legitimate constitutional basis on which to legislate.

It is important to note that a subject matter in the division of powers may be comprised of several aspects or segments. In certain cases, some aspects should be within federal jurisdiction whereas other aspects of the subject matter may well be given to the Provinces. If the subject matters were divided into their component parts, rather than using all embracing language, aspects of the subject could be exclusively assigned to one or other level of government and thus avoid the duplication and inefficiency problems that concurrency can cause.

My concept of "segmented subject matters" is best understood by giving some concrete examples. Take the subject of "communications". For several years some provinces have sought more constitutional power in this field. If they succeed in negotiating more power in this area, how will it be expressed in the formulation of the division of powers? Because it is a field in which the federal government will wish to obtain control over certain aspects, it would be folly to specifically provide in the division of powers that "communications" is a concurrent power. To do so would invite chaos, uncertainty, duplication and waste. A much more preferable approach would be to break down the subject into its component parts and exclusively assign legislative jurisdiction of each component to the level of government best suited (based on the principles set out at the beginning of this chapter) to exercise the power.

Continuing with the example, communication divides into the following components:

Communications

A. Telecommunications
   (1) common carriers providing local calling and/or intra-provincial transmission services;
   (2) common carriers providing interprovincial transmission services.

- B. **Broadcasting**
    - (1) radio;
    - (2) television.
- C. Closed Circuit Cable
- D. Regulatory issues
    - (1) rates;
    - (2) service;
    - (3) frequency spectrum;
    - (4) broadcast content.

A possible division of powers in this case, might be:

- A. (1) Provincial;
    - (2) Federal, but delegated to Province.
- B. Federal
- C. Provincial
- D. (1) Provincial;
    - (2) Provincial;
    - (3) Federal;
    - (4) Concurrent, with provincial paramountcy.

The regulation of the environment is another example. Not surprisingly, the Constitution makes no express reference as to which level of government has jurisdictional responsibility for the environment but that has not proved a barrier to government action. Each level of government, to the extent that it concerns itself at all with the constitutional basis for regulating this activity, relies on other heads of power within the Constitution or broad and general terminology of the kind that I have described above. As a consequence, both levels of government are falling all over each other in attempting to regulate the field. The result is chaos. Resource users are confused as to which level of government has jurisdiction; decisions are delayed through intergovernmental turf battles, court intervention on jurisdictional issues is increasingly apparent, and, above all, the taxpayer is paying dearly for the overlap and inefficiencies.

For example, about a year ago Ottawa announced it was going to start enforcing its own environmental regulations on pulp mills in British Columbia and elsewhere. It is reported that provincial officials asked "Why, when we already have 60 inspectors in this field and you've got only one for the entire province?"[94]

To amend the Constitution to place the words "Regulation of the Environment" into the jurisdiction of one or other level of government, or even to put it into the concurrent category would not solve the problem. Again, consideration should be given to having the subject divided into its component parts and jurisdictional allocation then made of each part. By way of illustration these components might be:

Environment

- A. Regulation flowing from ownership of the environmental resource —permits, licences, approvals.
- B. National environmental standards
- C. Intra provincial environmental protection
- D. Interprovincial or other transboundary issues
    - (1) when co-operation exists between the two jurisdictions involved;
    - (2) when requested by the two jurisdictions involved.

A possible division of powers in this case might be:

- A. Provincial
- B. Federal
- C. Provincial
- D. (1) Provincial;
    - (2) Federal.

Immigration is another subject matter that would lend itself to a segmental approach. The subject essentially comprises three segments: planning, selection and settlement. Logically, the degree of involvement of the two levels of government should differ on each of the three. Here too it would be preferable to have this spelled out in the Constitution rather than maintain the present provision of concurrency over the whole of the field.

I do not address in an exhaustive way in this paper those powers which the Province of British Columbia would wish to have transferred to it either fully or by way of concurrent jurisdiction. These are matters to be decided at a later date and in the context of actual federal-provincial constitutional negotiations, although the Province should be working on this at the staff level now. Suffice it to say that traditionally the Province has been pressing for more constitutional jurisdiction in the area of communications, offshore resources, immigration, environment, fisheries, elements of family law and taxing powers (but particularly tax room).

Finally, it is reported that committees of Deputy Ministers at the federal level have recently been established to identify areas of jurisdictional overlap and duplication. I would propose that the mandate should be enlarged to identify subject matters that might be transferred by constitutional amendment to the provinces and that the process should be restructured to include representation from the provinces and, depending on the subject-matter under review, appropriate interests from the private sector. Advice should also be sought from members of the academic community, research institutes and others. It is doubtful that a sufficient degree of objectivity can be obtained if the process is limited to the present stakeholders (i.e., federal deputy ministers).

So much as possible this process should be undertaken in an objective, non-partisan, systematic way. It should be based on the application of the principles set out earlier in this chapter with a view to developing a full and impartial assessment of which level of government each subject matter should be assigned to, ideally. With such an assessment in hand, governments and the people of Canada would then be able to base their decisions, in the negotiations which lie ahead, on an informed and rational basis.

E. The Supreme Court of Canada

Section 101 of the *Constitution Act*, 1867 permits the Parliament of Canada to establish "a general Court of Appeal for Canada." Pursuant to this authority the Parliament of Canada created the Supreme Court of Canada, by passage of federal legislation in 1875. The Court's very existence, composition and jurisdiction, together with the power to appoint its judges, are to this day contained within ordinary federal legislation. Having the continued existence of the institution which fulfills the role of impartial umpire in our federal system dependent on the pleasure of the federal government alone is an undesirable state of affairs.

1. Importance of the Court

The importance of the Supreme Court of Canada in our federal system can hardly be over-emphasized. Since appeals from Canada to the Judicial Committee of the Privy Council were abolished in 1949, the Supreme Court of Canada has been the final judicial authority on criminal, civil and constitutional matters and, since 1982, the interpreter of the Charter of Rights and Freedoms. More than any other factor, this latest addition to the Court's jurisdiction has greatly enhanced the Court's power in that the broad language of much of the Charter allows the Court to be the instrument (rather than Parliament and the Legislatures) to give the Charter meaning and to set the direction on a great range of social policy issues and some economic issues as well. It is not within the scope of this Paper to debate the wisdom or otherwise of moving from the concept of parliamentary supremacy to that of judicial review which took place on the coming into force of the Charter. Suffice it to say that it has resulted in a monumental shift in decision-making and that the full burden of that responsibility now falls upon the Supreme Court of Canada.

Even before the advent of the Charter, the Supreme Court of Canada has, at least since the mid 70's, become more highly visible as a crucial institution of the Canadian system of government. There was, what Professor Peter Russell calls, "a veritable explosion of constitutional litigation" amounting to a fourfold increase in constitutional cases between the first five years of the 70's and the second five years.[95]

Another reason for the increased prominence of the Supreme Court in recent years has been the increased tendency to resolve federal-provincial issues in this forum. Throughout the 1960's co-operative federalism did much to keep any potential constitutional issues out of the courts. But, after 1968, the combination of Prime Minister Trudeau's more rigid approach to federalism and the growth of expertise, confidence — and power — in the provinces, and the lack of effective federal-provincial political institutions to broker these interests, has caused provinces oftentimes to resort to the judicial process to seek redress. Some recent cases arising in this province include a challenge to federal government efforts to unilaterally alter the contractual terms of shared cost programs in the area of social welfare; a challenge to the federal government's intention to discontinue the passenger service on the E & N Railway, with the Province alleging that to be a breach of federal obligations relating to our entry into Confederation; and a challenge to the federal government's efforts to stack the Senate by eight additional senators through extraordinary means.

By far the most significant constitutional cases of all were the Reference cases brought by eight provinces first to the Courts of Appeal in Manitoba, Quebec and Newfoundland, and ultimately to the Supreme Court of Canada, wherein those provinces sought the aid of the Court in blocking Prime Minister Trudeau's unilateral attempts to patriate the Constitution. This case is dealt with at some length in an earlier part of this Paper at pages 15 to 17.

2. "Constitutionalizing" the Court

Past intergovernmental discussions have indicated that there is general acceptance of the proposition that the Supreme Court of Canada, its powers, jurisdiction, composition, and the procedure by which its members are chosen, should be incorporated within the Constitution.

Being the ultimate arbiter of federal-provincial disputes and in all other respects the interpreter of the Constitution, including the Charter of Rights, it is inconceivable in a federation that this Court should remain the creation of only one level of government. Among federations, Canada has that unique distinction.

There are those who contend that the fact that the Court is established by ordinary federal legislation is irrelevant because the principle of judicial independence assures that the Court is not beholden to either level of government, including the level that created it. But in a federal setting public perceptions are just as important as legal niceties. Although the principle of judicial independence does guarantee the impartiality of the Court, in fact in the public mind, its impartiality may be called in question if its very existence is dependent on ordinary federal legislation.

3. Jurisdiction of the Court

It has already been stated that the Court presently exercises final appellate jurisdiction on matters criminal, civil and constitutional, including the interpretation of the Charter of Rights and Freedoms.

There are those who hold the view that the Court's jurisdiction should be amended to limit it to dealing only with constitutional cases and cases involving the interpretation of the Charter. If this proposal were to be accepted it would mean that the ultimate courts on matters criminal and civil would be the courts of appeal of the respective Canadian provinces.

An adaption of this model is a constitutional court that would be a chamber within the present Supreme Court. It is advocated that a constitutional court, structured along these lines, would be staffed by judges who, before appointment, would be recognized experts in constitutional law. The theory is that this special expertise, coupled with a case load consisting of only constitutional cases, would result in constitutional decision-making of a higher quality than the decisions being rendered by the current non-specialist court.

The consequence of making the Supreme Court only a constitutional court is that the ultimate appellate court on civil and criminal matters in each of the provinces would be the court of last resort in each of the provinces. Supporters of this view hold that a provincial superior court with resident judges is better able to interpret provincial statutes and apply the common law in a local context because of their understanding of the needs of, and experience in, the provincial community.

The argument is that provincial governments were created and provincial laws are enacted to provide localised solutions to localised problems. Provinces have dissimilar legislative responses to public policy needs and the argument is made that these should not be discouraged or diluted by allowing a national judicial body to pass judgment on provincial law with the undesirable likelihood that those provincial laws would be interpreted and enforced in a uniform fashion. These arguments have an added dimension in Quebec with its unique civil law system.

Notwithstanding the force of these arguments, the writer is of the view that there should not be a separate constitutional court in the Canadian judicial system and, further, that the Supreme Court of Canada should continue to be the final appellate court on criminal, civil and constitutional matters. This is because it is often impossible to separate constitutional and non-constitutional issues in a particular piece of litigation. Neither can be examined in the abstract. They can be considered only in the context of a concrete factual situation. Many factual situations present elements of both types of issue. Even if legal issues could be separated in that way, in my view it would not be desirable to do so. There is a value in Supreme Court Judges seeing the whole panorama of the law. The experience of decision-making in private law cases will make the Judges better constitutional decision-makers. Moreover, it is questionable whether the country needs nine different "common laws" which is what might be the result if the Supreme Court of Canada could not play its current supervisory role. A basic uniformity of interpretation of the common law throughout the country would seem to be desirable.

Moreover, the Supreme Court of Canada is master over its own docket and, in the exercise of that power, is evolving rapidly to a position where most of its activity is on the constitutional front, including the Charter of Rights and Freedoms, and fewer and fewer cases involve appeals of private law cases.

One alteration to the existing jurisdiction of the court would seem to be desirable, however. That is, the right of a province to refer directly to the Supreme Court of Canada a significant constitutional issue for the Court's opinion. At the present time, only the federal government has this power. As a consequence, in order for provinces to obtain an opinion of the Supreme Court of Canada on an issue of importance to it, reference proceedings must first be brought before the Court of Appeal of the respective province and then on appeal to the Supreme Court of Canada. This was the route that provinces had to follow in the Constitutional Convention cases of 1980.

4. Size and Regional Composition of the Court

The Court comprises nine members. Initially it was six and subsequently increased first to seven and, when appeals to the Privy Council were abolished in 1949, to nine. This does not mean that all nine judges normally sit on a case. The normal practice in criminal and civil cases is for five judges to sit. In constitutional cases, seven or nine judges is the usual number.

Because there are appeals to the Supreme Court from Quebec's civil law system, the *Supreme Court Act* now provides that at least three of the nine judges should be from the Bar of Quebec. The Act does not specifically provide for representation from other provinces but until very recently the unbroken practice was for three judges to come from the Bar of Ontario, two judges from Western Canada and one judge from the Atlantic region.

Unfortunately, since British Columbia's entry into Confederation, there have been many years in which there has been no judge on the Court from this province. There are those who argue that, in the light of judicial independence, there is no necessity for judges on the Court to be drawn from the various regions of Canada. Those who make this argument most strenuously are usually from Ontario who, as has been said, up to very recently, has always had three judges on the Court. To have judges drawn from each of the regions of Canada is not to suggest that those judges are direct representatives of those regions in the sense that a member of an arbitration board may be considered to be representative of the interest that appoints him. On the contrary. But in a country as diverse as Canada, as one leading scholar has said, members of the Court should be in a position to inform and educate one another on essential facts and background from their respective parts of Canada.[96]

Moreover, the historical and political considerations that were relevant upon a province's entry into Confederation can, from time to time, have a bearing on constitutional litigation before the Court. Where these territorial aspects come into play, it is useful to have someone on the court who is familiar with the particular circumstances. For example, when the Supreme Court of Canada decided the ownership of the offshore resources of British Columbia in a reference case in 1967, it is most unfortunate that none of the judges on the court were from British Columbia. Many of the arguments advanced by the province drew upon British Columbia history and local circumstances going back to the time of Confederation. Incidentally, the decision was in favour of the federal government.

Feelings of regional alienation in British Columbia are oftentimes fostered through perception as much as reality. If there is no representation on the court from British Columbia the public perception may be that the institution is irrelevant and not particularly attuned to our province's interests and concerns.

As I mentioned earlier, the *Supreme Court Act of Canada* provides that three of the judges be appointed from the bar of Quebec. The rationale for this has been that there should be sufficient judges on the Court versed in the Quebec civil code to handle any civil code appeals.

In my view the continual decrease in recent years of appeals to the Court in civil code cases makes the three judge from Quebec requirement an anachronism. In the last 3 years for which statistics are available (1986-1989) the Court heard a total of 304 appeals. Only 11 of these involved the Quebec civil code. During the same period, there were a total of 1295 applications for leave to appeal. Only 33 involved the Quebec civil code and of these only 4 applications were granted.[97] The Court deals with far more cases in the highly specialized area of maritime law, for example, without there being any requirement for judges trained in that area.

This relative insignificance of civil code cases in the work of the Court does not warrant the continuation of the practice, embodied in the *Supreme Court Act of Canada*, of having three judges on the Court from Quebec. Moreover, it certainly does not support the conventional wisdom which says that this requirement should be embodied in the Constitution.

In the spirit of "abandoning the accepted myths about how this nation works" and "tossing out old orthodoxies",[98] I propose that the *Supreme Court Act of Canada* be amended by deleting the special provision relating to the requirement that three Judges be from the Bar of Quebec.

It is my recommendation that the membership of the Supreme Court of Canada should be increased to ten. The make-up of the Court at all times should be represented by appointments drawn from all five regions of Canada, the Atlantic region, Quebec, Ontario, the Prairie region and British Columbia.

Some will argue that a ten-member court can result in a stalemate. It is not proposed that ten judges sit *en bloc*. Just as there are rare occasions when nine judges sit, so with a ten member court, the make-up of the panels could be left within the hands of the Chief Justice. To have an extra member on the Court would provide a measure of flexibility which would permit more time for judgment-writing and which could make more easily possible the Court sitting simultaneously in two panels of five.

5. Appointment of Judges

Over the years a variety of proposals have been put forward to provide a measure of input to the provinces in the appointment of judges to the Supreme Court of Canada. At the moment the appointment process is solely in the hands of the federal government. Previous formulations, notably those within the Victoria Charter and in the 1980 best efforts draft were, in my view, altogether too cumbersome and complicated. Neither was ultimately accepted. Page after page of draft constitutional text was devoted to a scheme requiring consultation and agreement between the Attorney General of Canada and the Attorney General of the province of residence of the prospective judge being considered for appointment. If the two Attorneys General could not agree, then a deadlock breaking mechanism would fall into place thus raising the rather unseemly spectre of judicial appointments being arrived at through an arbitration board-like process.

In the earlier proposals of this Paper relating to the establishment of the Council of the Federation, it is proposed that the appointment of judges to the Supreme Court of Canada be ratified by the Council. The federal government would put forward the nominee and all provinces, through their representation on the Council would have a genuine role in the appointment process. This would probably open the judicial appointment process to a greater degree of public scrutiny and might even result in the Council holding hearings before confirming a Supreme Court nominee. This might have the same beneficial effect that Senate confirmations hearings have in the United States — namely, the denial, generally speaking, of high judicial office to persons of less than great ability and good reputation. Given the enhanced role which the Supreme Court of Canada now has in deciding large social issues of the day, through its interpretation of the Charter of Rights and Freedoms, it would seem that such a process of scrutiny would be highly desirable.

F. Federal Boards and Commissions

1. Generally

The number and importance of federal regulatory boards and commissions have increased dramatically in recent years for a variety of reasons. The increase in the number of functional responsibilities assumed by government and a perception that cabinets are overloaded, and hence should not be further enlarged to deal with an ever broadening range of governmental responsibilities, has led to the use of boards, commissions and crown corporations as practical alternatives.

In some cases, their use reflects a desire to focus the attention of a governmental instrument on a single set of problems; or stems from a desire to substitute collegial for single person decision-making; or to accentuate an investigative function; or, in some cases, to outflank perceived barriers to rapid action (such as controllers, treasury boards and public service commissions) so often associated with traditional government operations. Another reason for their use may be to remove some policy-making responsibility from the hands of the elected politician, or, in the case of regulatory agencies, to regulate an area of activity in such a way as to constrain those in a monopolistic situation so as to make the most efficient allocation of their resources from society's point of view.[99]

The degree of independence which these bodies exercise vary from case to case and is, to a large extent, governed by the terms of the statute or other instrument which provides for their establishment and sets out their mandate. A good case can be made for greater direct ministerial and cabinet control exercised over the legislative and administrative activities of many of these agencies while obtaining their independence in areas of adjudication.

Because of the importance of many of these agencies in establishing and implementing national policy on a great range of matters, these independent regulatory agencies, many with legislative, administrative, and adjudicative powers, have been described as being "miniature governments." At the federal level alone, these agencies number in the hundreds. Their actions exert a major influence on the Province. Annually these agencies purchase $28.6 billion in goods and services and employ over 100,000 Canadians.[100] From a British Columbia perspective, the most significant of them include:

The Bank of Canada;
The Canadian Transport Commission;
The Canadian Radio and Television Commission;
The National Harbours Board;
The Canadian Broadcasting Corporation;
The National Energy Board.

Because regional needs differ from province to province, it is essential that these agencies be comprised of directors who are drawn from all parts of the country (on a fair and equitable basis) and who bring to bear in the decision making process the particular needs and concerns of the region from which they come. This is the issue which is addressed here and not a full review of *all* aspects of regulatory agencies in Canada.

This paper has already shown that representation from peripheral Canada generally, and from British Columbia in particular, is woefully inadequate. A study has shown that no less than 72% of the members of the 12 regulatory agencies studied show their workplace, at the time of appointment to be either Ontario or Quebec.[101] While no one would dispute that the primary consideration in making appointments of this kind should be the competency and experience that the appointee brings to the job, one has to question whether the overly high representation from Ontario and Quebec is an accurate reflection of the country's reservoir of expertise.

A 1979 internal study showed that no British Columbians sat on the boards of 11 of the 19 boards and commissions of most significance to British Columbia. A more recent internal study shows that in FY 88/89, British Columbia's share of directors on 31 major federal boards and commissions amounted to 7.1% of the total number.[102] At the Chief Executive Officer level, the situation is even more bleak. Of the 21 C.E.O. positions in the top 31 Crown corporations, British Columbia held none. Approximately 76% of them are held by Ontario and Quebec.

Another key area of concern is the location of head offices. Of the 31 crown corporations studied, the head office of only one is located in this Province, the west coast based Vancouver Port Corporation. 81% of the head offices are located in Ontario and Quebec.

To British Columbians, this lack of representation raises serious questions as to the likelihood of these agencies taking our Province's best interests into consideration. Based in Ottawa, stocked with central Canada appointees, staffed by bureaucrats the vast majority of whom are cast in a central Canadian mindset, but who may briefly venture forth into peripheral Canada for an odd hearing or meeting, is not a model that is conducive to British Columbians perceiving these agencies as having much sensitivity to their particular day-to-day needs.

In the proposals already set out in this paper, it is proposed that the Council of the Federation should have a hand in the appointment process of directors to major federal boards and commissions in the expectation that, over time, a fairer and more equitable distribution of representation from throughout the country would result.

In addition to that, the federal government, by a change of political will alone, could forthwith and without the necessity of any constitutional change whatsoever, rectify the regional imbalances that now exist in representation on major boards and commissions and the locations of their head offices. For the federal government to do so would be tangible evidence that it is serious, when the Prime Minister in his Buckingham, Quebec speech said:

> *"We must never forget that this is a vast and diverse country and we do not want everything run from Ottawa — which is often perceived as remote and isolated from the concerns of Canadians. On many questions the voices of the regions should be encouraged and not ignored . . . promoted and not stifled."* [103]

2. Regionalism and the Bank of Canada

The main function of the Bank of Canada is the formulation and implementation of Canada's monetary policy, both domestic and international. This involves policies with respect to the size and rate of growth of the money supply, the level and structure of interest rates, the availability of credit, the foreign exchange rate and foreign exchange reserves. The Bank of Canada manages Canada's foreign exchange reserves on behalf of the government of Canada and acts in the foreign exchange market for the government. It also participates in international financial organizations on behalf of Canada.

The Bank of Canada is established and operates under the *Bank of Canada Act*, as amended from time to time. Its management is entrusted to a Board of Directors consisting of the Governor, his senior deputy governor, and twelve directors, all appointed by the federal government. The federal Deputy Minister of Finance is a member of the Board, ex officio, but without vote. Directors are appointed for three-year terms; the Governor and senior deputy for seven-year terms. The Board meets infrequently, but an executive committee consisting of the Governor, the deputy governor, the deputy Minister of Finance, and two directors meet weekly. The day to day management of the institution is in the hands of the Governor and his staff.

Effective regional input is essential in establishing a monetary policy for the country. From time to time the macro economic problems of the various regions of the country diverge. Full employment in some regions may be accompanied by significant underemployment in other regions. Policies designed to restrain "national" inflationary pressures may aggravate unemployment in some areas.

While it is conceded that regionally differentiated monetary policies are an impractical solution and that the country as a whole must have one monetary policy, there certainly is a substantial need for more effective regional input into the formulation and implementation of Bank of Canada policy.

Although the practice has been for the directors to be drawn from throughout Canada, it is apparent that the members of the Board have very little input into the formulation of bank policy.

The chief economist for one of the major chartered banks of the country recently noted that although the twelve directors of the Bank of Canada are supposed to provide regional input to monetary policy, there is in fact no regional input and the bank's "ignorance of the regions is 'absolutely ridiculous'."

He goes on to state:

> *"The Board of Directors is supposed to have [regional input], and what do you hear? There is not one dissenting word ever reported in the minutes of the Board of Directors' Meeting, not one comment ever reported, as if not one of the Board of Directors ever said anything."* [104]

In the same article, Ivan Bernier, Director General of the Quebec Centre for International Relations at Laval University in Quebec states, "There should be a formula for greater provincial input."

The rather lamentable response of the Bank to this criticism according to this article, is "that the Bank is constantly sending officials (and sometimes the Governor) on trips outside Ottawa."

The following improvements are proposed:

1. First and foremost, the directors of the Bank should be knowledgeable, strong and articulate voices. They should be recognized from within the regions of the country from which they come as leaders in the areas of expertise directly related to the central bank's mandate.
2. Although all the directors could continue to be appointed by the federal government, those appointments should require ratification from the Council of the Federation.
3. Directors should be encouraged to bring to the deliberations of the Board the considered views of the region from which they come. To assist them in this regard, they ought to be given a substantial independent research capability tailored to measure regional monetary policy needs.
4. The *Bank of Canada Act* should be amended to make it plain that the Board of Directors is to have a more active role in policy formation — a reform proposed by the Porter Royal Commission on Banking and Finance in 1964 but never implemented.[105]
5. The Governor of the Bank of Canada should be required to make an annual presentation to the Council of the Federation.

I recognize that the *Bank of Canada Act* requires regular consultations between the Minister of Finance and the Governor of the Bank on monetary policy and its relation to general economic policy and provides that, in the case of disagreement on policy, the Minister may give to the Governor a written directive which the Bank must comply with.

The proposed changes in the nature and role of the Board of the Bank, as set out above, are not inconsistent with the retention of the present requirements for consultation with the Minister of Finance and the power to instruct. Given the inherently national nature of monetary policy, it is conceded that there is no alternative to ultimate federal responsibility for that policy. It must be in harmony with other aspects of national stabilization policies.

But although frequent consultations between the Governor and the Minister of Finance are essential, and in the end the federal government must have its way on overall policy, the Bank must have more effective regional input and a substantial independent presence in policy formulation. These proposals would help achieve that result.

IV. Non-Constitutional Reforms

A. Introduction

There is a danger in assuming that all of the country's ills can be cured if only we could alter the Constitution in a particular way — each advocate of reform having, of course, his or her own particular proposals.

At best, the Constitution is a framework for governments' actions and sets out the basic rights of the country's citizens. Under it, governments have great latitude for action in the development of public policy — shaping the country's direction and touching upon all of its citizens.

Within the constitutional framework the actions of the executives of government, Parliament and the legislatures, the courts, various other governmental instrumentalities and agencies, and government bureaucracies all combine to set the direction for the country. In economic terms, depending on political ideology, that direction may range from a totally unregulated market economy philosophy to state socialism at the other end of the spectrum. The point is that the Constitution is sufficiently flexible to allow governments to move from one point on the spectrum to another without the need for amendments to be made to it or without the Constitution in any way being an impediment to doing so. What is true on the economic side is equally true in the area of social policy.

Another truism, but one that needs to be restated particularly in this time of restraint, is the tendency of governments to legislate and deliver programs to the n'th degree just because they have the constitutional jurisdiction in a given subject area. For a government to have constitutional power does not mean that it must occupy the field with an ever enlarging array of public programs at the taxpayers' expense. Much of the duplication and overlap which exists at the present time can be eliminated *now* and requires no changes to the Constitution to do so. Ironically, within a week of the Prime Minister making a speech recommending a new federal arrangement providing greater decentralization to the provinces, the federal government embarked upon a new program, costing $136 million, in the area of family violence and abuse.[106] Commendable as it may be for governments to concern themselves with this undesirable activity, this is largely a matter that falls within provincial constitutional jurisdiction and for which many of the provinces are already mounting effective programs.

In short, solemn federal pronouncements that the government is prepared to move towards more decentralization of governmental activity need not wait for, nor are they dependent upon, constitutional reform. Governments should show leadership now by pulling back from initiating new programs, dismantle existing programs which overlap with similar programs in the other jurisdiction, and abolish programs that have outlived their usefulness or are less than essential. This issue will be dealt with at greater length later in this paper.

B. The National Debt and Deficit

"*If your* outlay *exceeds your* income, *then your* upkeep *will be your* downfall."[107]

This simple homily, stripped as it is of bureaucratic double speak and commonly understood in the households of all Canadians, appears to be beyond the comprehension of the fiscal managers of the Government of Canada.

So desperate is the financial condition of the Government of Canada that the consequences to the very future of the country may, over the medium term, pre-empt considerations of constitutional reform. Consider the following:

- by 1984 the outstanding debt of the federal government since the time of Confederation amounted to $160 billion. Between 1984 and 1991 it will have increased to $400 billion;
- 35 cents of every federal revenue dollar goes to pay the *interest* on the debt;
- the national debt is increasing at the rate of approximately $30 billion per year;
- the national debt is large enough to paper two lanes of the Trans Canada Highway from Vancouver to Toronto with one hundred dollar bills or to buy a new home for everyone in British Columbia over the age of 10;[108]
- taxpayers are receiving only 65 cents' worth of services for every dollar of tax they pay to the federal government; (In British Columbia taxpayers receive 96 cents' worth of services for every tax dollar paid to the province),
- the federal government pays $113 million interest every day on the national debt. That translates to about $100 thousand in the time that it takes to read this page;
- the federal budget deficit, relative to the size of the Canadian economy, is among the highest of all major industrialized countries — second only to Italy;
- this fiscal year the $41.2 billion that Ottawa will pay in interest alone is more than the combined budgets of British Columbia, Alberta and Saskatchewan;
- this year alone each Canadian taxpayer is paying over $3,000 towards interest on the national debt.

The need to attract foreign capital to finance these deficits and pay interest on the national debt contributes to unusually high Canadian interest rates relative to those in the United States. This negatively affects every province in Canada by making exports less competitive.[109]

It is abundantly clear that the "best efforts" of the federal government to date have achieved little in decreasing the deficit much less in tackling the national debt. Each year brings its own deficit of about $30 billion and therefore, far from decreasing the national debt, the debt actually increases by this amount every year.

Even as the deficit proves increasingly difficult to control, the federal government continues to involve itself in more and more programs, many of which are in areas of provincial jurisdiction. Recently the following initiatives were announced:

- the federal government's strategy to replace existing day care funding through the Canada Assistance Plan with a new scheme promising much more comprehensive and costly coverage;
- the Prime Minister's promotion of a national education strategy, intended to improve the teaching of science-related subjects in schools;
- the institution of a federal Department of Forestry — even though the federal government has no actual forest management responsibility;

- the recently announced $300 million program to reduce high school drop-out rates; and,
- reference has already been made to the family violence program.[110]

In many cases, these are areas where Ottawa has no experience, no program infrastructure and no responsibility. The consequences are waste, duplication and overlap.

Attempts to seriously control federal government spending and reduce the deficit and the national debt have clearly proved to be less than satisfactory to date.

Clearly some more drastic solutions will need to be applied to restore the country's fiscal capacity and to ensure the continued standard of living to which Canadians have become accustomed. Constitutional change must be accompanied by greater fiscal prudence, or it will be to little avail. The following three solutions are suggested:

1. Spending limitations

Total federal spending must be more drastically reduced. It proves little to divide federal spending (as has been done in the past several budgets) into program spending, on the one hand, and debt servicing on the other. By doing so in an effort to show that program spending is increasing slowly, and in isolation to the costs of the servicing of the debt, is to live in a fool's paradise. It is equivalent to a financial analysis of a bankrupt corporate empire which would find it healthy and thriving so long as the debentures, bonds and bank loans are not taken into account.

In the recent federal budget, spending on federal government programs alone was slated to increase by 6.9% in the 1991/92 fiscal year. Ironically, in the very same budget, the Finance Minister proposed to introduce legislation to keep overall program-spending increases limited to 3% for the next few years. Legislation is not necessary to achieve this but it is a convenient way to forestall serious federal spending cuts another few months or year. One wonders why the Finance Minister could not, here and now, be bound by the criteria he proposes to put in place for the Minister of Finance one year hence.

As painful as it might prove to be, the Government of Canada should freeze government program expenditures at the 1990/91 level for a period of three years in order to assist in getting the deficit under control. This is not unlike proposals put forward by business organizations such as the Canadian Chamber of Commerce and others.[111]

2. Reducing Government Overlap, Duplication and Waste

As far back as 1976, the Premiers of the four western provinces declared a common concern over the increasing tendency, perceived at that time, of federal legislation being initiated in subject areas which historically and constitutionally had been considered to be provincial. They established a task force of Ministers, chaired by British Columbia, to prepare a detailed inventory of these apparent intrusions and to make representations with respect to them. The Task Force identified 61 areas of intrusion.[112]

In transmitting the Report to the Prime Minister, Premier Bennett on behalf of the Western Premiers expressed the hope that the Task Force Report would "contribute towards a lessening of federal-provincial tensions in areas where, in the provinces' view, recent actions by the federal government had created, or were likely to create, undesirable friction."[113] The Prime Minister responded favourably and significant discussions took place between governments over the course of the following year resulting in considerable progress in addressing the concerns. The issue expanded into an all-province concern at the Annual Premiers' Conference held in August 1978. Subsequently all governments agreed that eliminating duplication of government services was a task for immediate attention.

However, with a new government at the federal level in 1979 having its own particular agenda, and the preoccupation of the subsequent Trudeau government in 1980 with constitutional reform, little systematic attention was given to the issue until the establishment by the Mulroney government in September 1984 of the Ministerial Task Force on Program Review under the chairmanship of Deputy Prime Minister, the Honourable Erik Nielsen. The mandate of the study was to produce an inventory of government programs with special concerns for identifying duplication, waste and inefficiencies within the federal government apparatus.

The Task Force selected 989 federal programs and services for review, reflecting annual federal expenditures of more than $92 billion. The scope of the Task Force and its study teams was unprecedented. There had never before been an attempt to improve services and programs or realize efficiencies across the entire federal government system in one concerted effort.

The enormity of the task was described by Mr. Erik Nielsen in a speech to the Canadian Club in Toronto in February 1985:

> *"The inventory has shown us the extraordinary complexity of our task. Each problem in its own way is a monument to some problem of the past. Programmes are often designed on an ad hoc basis, and targeted to a single problem without much reference to other programmes that may address similar problems. From the client's viewpoint, this can result in a confusing hodgepodge of sometimes conflicting programmes. We must, therefore, ask ourselves to what extent the original problems still exist and to what extent the original solution is still valid. For instance, through Agriculture Canada, the federal government still manages pastures and livestock in western Canada. Is there still a need, I must ask, to have federal bulls (or sacred cows) in federal pastures?"* [114]

With only a year to do its work and with the advice of a private sector advisory committee to assist, the Task Force broke out into nine study teams, comprising about a dozen members on each team. Private sector participants slightly outnumbered federal public servants in the total make-up of the study teams.

As the study teams began to produce their respective reports, a number of broad patterns emerged and were identified by virtually every study team. Although in some cases these concerns were outside the actual terms of reference of a specific study team they were of sufficient significance to warrant attention. Six such issues emerged that are worth reiterating here.

a. The Universal Subsidy

> *"The phenomenon of the "universal subsidy" is a constant theme running through all the study team reports — subsidies through both tax provisions and direct expenditures, statutory as well as non-statutory. Governments have used subsidies to equalize between the "haves" and the "have-nots," to support failing enterprises, to provide essential services and to encourage certain economic or social behaviour.*
>
> *Study team after study team questioned whether these subsidies were warranted; the successive team reports show that, in the absence of any political considerations, the answer has been, by and large, "No."*
>
> *As a consequence, the impact on the Canadian economy has been likened to Gulliver, tied down by a myriad of Lilliputian subsidy ropes . . . each rope infinitesimally thin, yet together immobilizing.*
>
> *Of all the generic issues identified, the universal subsidy reflects most clearly the philosophical legacy inherent in the current stock of government programs. The limited flexibility and adaptability of the Canadian economy is due in large measure to this legacy."* [115]

b. The Fiscal Totality

The Task Force found only about 21% of federal government expenditure is of a non-statutory nature and therefore "controlled" in the sense that is subject to ministerial scrutiny. It discovered that new program proposals were never challenged or scrutinized within the total fiscal context. The Task Force discovered that the government had little idea of the magnitude and effectiveness of benefits received from government programs across the board. Knowledge of the costs and benefits of government regulation were found to be even more rudimentary. The Task Force summed up the problem in this way:

> *"This inadequate knowledge of the fiscal totality manifests itself not only in the absence of a comprehensive view of tax expenditures in relation to direct expenditures, but also in numerical inadequacies regarding the magnitude of program expenditures, tax expenditures and the hidden costs of regulation. The combined effect of these shortcomings is a general inability to advise ministers about the precise financial inter-relationships of new programs and old programs which, in turn, has given rise to the observation that government spending is out of control."*[116]

c. Inadequate Program Evaluation

The Task Force found that routine government program evaluations were generally useless and inadequate for the work of the program review. It found that the basic question of whether these programs should exist at all was rarely raised at the departmental level and that a further limit to departmental evaluations was their inability to examine cross-agency programs or similar programs in other departments. The Task Force concludes:

> *"The inter-relationship of three generic issues — the universal subsidy, the lack of understanding of the fiscal totality and inadequate program evaluation — creates a system which expands with the inexorable growth of a rolling snowball."* [117]

d. Lack of Institutional Memory

Study teams identified a phenomenon which was labelled lack of institutional memory. As an example,

> *"The transportation study team noticed that the Ministry of Transport obtained Treasury Board approval to build a series of airstrips in Labrador on the grounds that increased air transportation would inevitably reduce the need for the existing ferry subsidies. A year later, when the department proposed to increase the ferry subsidies, Treasury Board did not raise any questions about the status of the airports."* [118]

e. Shortcomings in the Personnel System

A study group found that the personnel classification system of the federal government ran contrary to virtually everything the government is attempting to accomplish. That system establishes a direct relationship between an employee's classification (and hence his salary) and the size of the organization being managed, including the number of staff and the magnitude of funds expended. In short, hiring more persons and spending more money is the prerequisite for a manager to receive a higher job classification. The Task Force states it this way:

> *"There appear to be few incentives for public sector managers to accomplish new or difficult tasks, to try innovative approaches to provide better service to the public, or to try to do more with less. In fact, the reverse is more likely true."* [119]

f. The Pervasive Force of the Status Quo

The Task Force found that the pervasive power of the status quo was the most intractable generic issue of all.

> *"Even where a given program is proven demonstrably useless, perverse or excessively expensive, abrupt termination often proves to be impossible. Thus, in order to be effective in achieving program reform, program evaluations must be accompanied or followed by careful strategic planning."* [120]

All of the above are but brief excerpts from the federal government's own Task Force. One can hardly imagine a more damning indictment of how the federal government operates. It should be stressed that the six issues identified are not found in isolation in the federal bureaucracy but are, according to the Task Force Report, endemic throughout the whole public service.

Space will not permit to detail at length the findings of the Task Force in respect to the 986 specific programs which it examined. Their findings comprise more than 20 volumes. The few listed below are but a random sampling:

a. Government Procurement Study Team

The Task Force noted that in 1986 the federal government spent more than $9 billion on purchasing everything from paperclips to battleships.

The study team's fundamental conclusion was that the government could "spend smarter" by increasing competitive tendering and promoting contracting-out initiatives. For example, the team estimated that if the percentage of competitive contracting was increased from the current 45% to 55%, an annual saving of about $100 million could be realized. Another $200 million could be saved if 15% of services, such as building and equipment maintenance, were contracted out rather than handled within the government.

b. Regulatory Programs Study Team

The study team in this area reviewed 146 regulatory programs administered by 34,500 public servants with a direct cost to government of $2.7 billion per year.

The study team concluded that the cumulative effect of regulation at three levels of government constitutes an enormous impediment to initiative, enterprise and personal freedom and costs taxpayers and consumers at least $30 billion annually.

c. Real Property Study Team

This study team found that as a result of decades of building and buying there was a "real property system which is bloated with inventory, undermanaged and overstaffed".[121] The study team urged a rigorous program of property divestiture and changes in the organization of government for real property management.

d. Services and Subsidies to Business Study Team

This study team reviewed a wide range of programs focused primarily at the business sector. These included sales tax exemptions, corporate tax expenditures, industrial incentives, small business programs, trade and market development, research and development programs and economic and regional development sub-agreements. 280 separate federal and federal-provincial programs were examined costing $16.4 billion in 1984/85 and involving more than 68,000 public servants.

> *"The major conclusion of the study team was that the government is "giving with both hands" through an overly rich, overlapping (inter-departmental as well as inter-governmental) industrial incentive system. This system includes direct grants as well as tax measures. The study team concluded that because tax and spending programs operate under different rules and controls, very few people can identify the extent of the programs' operations, or their impact."* [122]

The general consensus is that the comprehensive review undertaken by the Nielsen Task Force has been largely ignored by the federal government with little serious effort to implement its major recommendations.[123] The federal government should act even now on the recommendations of the Task Force in a systematic and comprehensive way. It should set up a process to require both the line ministries and the central agencies in the Government to "show cause" why the full recommendations of the Nielsen Report should not be implemented. Following that, an orderly system of implementation and monitoring should take place. To the extent that the program areas are federal-provincial in scope, or impact upon provincial programs, the federal government should show leadership by extending the exercise to include provincial governments so that some program rationalization in these areas can also take place.

3. Sale of Underutilized Assets

As a means of putting a significant dent in the national debt, the federal government should undertake to divest itself of some of the immense property holdings and other fixed assets which it has but underutilizes. The Nielsen Task Force estimated that federal buildings cover 30 million square metres of space while federal lands total about 21 million hectares. As well, the federal government owns 150 airports, considerable port property, and many prisons, parks and other prime real estate. Some 35,000 person years and $6 billion of annual expenditures is commited to real property activities. Total property holdings in 1985 were estimated to be at between $40 and $60 billion but in today's figures they now likely approach $100 billion. On the balance sheet of the Government of Canada these assets are shown at $1.00. Total federal government assets probably are valued at between $300 to $400 billion.[124]

A prudent and orderly sale of a substantial portion of some of the underutilized assets of the Government of Canada over a five-year period could produce a substantial sum of money which then ought to be applied, not to reduce the deficit, but rather directly towards reducing the national debt. The annual deficit should be reduced by other means, but the proceeds of disposing of assets of the Government of Canada should not be used to balance current account but should be directly applied to the national debt. To do so, of course, would have a beneficial effect on the deficit as well, in that there would be less national debt on which service charges would be paid every year.

Corey Smart, a Grade 6 student from Bradford, Ontario, had the right idea. At the high-level one day Debt Freedom Conference recently held in Ottawa, to talk about the national d,bt, Corey provided a tangible solution. He had previously organized a garage sale, sold his toys and travelled to Ottawa to donate the proceeds of $168.00 to pay down the national debt.[125] "A little child shall lead them."

C. Federal-Provincial Fiscal Arrangements

1. Taxing Powers

Under the Constitution, the federal government has the constitutional power to impose "any mode or system of taxation." In the exercise of that power the federal government, since Confederation, has imposed customs and excise duties, succession duties from time to time, corporate income tax, a "temporary" personal income tax since 1917, and numerous indirect sales taxes. Up until this year the federal government had largely left the direct sales tax field and the real property tax field to the provinces. With the imposition of the GST the federal government has now entered into the direct sales tax field in a major way.

The taxing power of provinces, on the other hand, is limited to raising "direct taxes." The classic definition of a direct tax is one that is imposed upon the person who ultimately is expected to bear it. Indirect taxes, on the other hand, are usually capable of being passed on to another person such as a subsequent purchaser in a transaction involving the sale of goods or services. The main source of provincial revenues historically has been property taxes, sales taxes, and corporate and personal income taxes. In the case of corporate and personal income taxes, and since January 1, 1991, sales taxes at the retail level, the provinces are obliged to share these fields with the federal government. Obviously the amount of taxes which both levels of government can collectively raise in these areas is finite because both levels of government look to the same taxpayer.

2. Harmonizing Tax Policy

It is essential, therefore, that the two levels of government work closely together to harmonize their tax policies to ensure that there is sufficient "tax room" for each level of government in those shared areas of taxation. With the increased tendency of the federal government to pay less and less towards shared cost programs in health, post secondary education and social welfare, the need for both levels of government to agree to an appropriate tax share has never been more necessary.

In 1990, the Western Premiers, under British Columbia's leadership, instructed their Finance Ministers to prepare a detailed report on:

- recent trends in federal-provincial fiscal relations, including federal cutbacks and offloading;
- the foundation necessary for an appropriate federal-provincial fiscal structure; and
- a process for furthering this review with other provinces and the federal government.

At the first meeting of the Task Force of Western Finance Ministers held in Richmond on July 10, 1990, British Columbia presented a discussion paper, **The Control and Management of Public Spending in Canada.**[126] A version of this Proposal was presented to the Standing Committee on Banking, Trade and Commerce on August 1, 1990.

A common western government position paper, drawing upon many of the British Columbian proposals, was subsequently approved at the Western Premiers' Conference at Lloydminster, Saskatchewan, on July 26-27, 1990 and discussed at the Annual Premiers' Conference in Winnipeg the following month.

In the meantime, British Columbia modified its earlier paper in order to parallel the western paper although its conclusions are much more fully developed. It is entitled **Resolving Canada's Dangerous Fiscal Situation through Renewed Federalism and Fiscal Discipline** and was the basis for bilateral discussions between the British Columbia Minister of Finance and his counterparts across Canada in September and October of 1990.[127]

That Paper identifies the critical issues facing the fiscal situation of governments in Canada and proposes in considerable detail practical steps needed to be taken by all governments "to recognize the economic and fiscal realities of the 1990's". Those recommendations include first, imposing limits on government spending and other fiscal controls and secondly, the realignment of revenues and spending to better match constitutional responsibilities.

In addition to supporting those recommendations, I would reiterate my proposal contained in Chapter III of this Paper for the establishment of a Council of the Federation which would be the forum in which shared-cost issues and other aspects of fiscal federalism could be systematically addressed.

D. Intergovernmental Agreements

The enlarged expansion of activities by both levels of government and their common involvement in a number of areas, especially since the end of the second world war, alluded to elsewhere in this Paper, has given rise to a proliferation of joint programs and agreements between governments. Some are bilateral agreements between the federal government and one province; others are multilateral in nature and embrace several provinces within one region or all, or most of, the provinces and the federal government.

The Federal-Provincial Relations Office of the Government of Canada publishes each year an inventory of programs and activities comprising the major shared costs programs along with other significant undertakings that involve joint federal-provincial administration or that are carried out through more or less formal intergovernmental agreements. Listed by federal department the most recent inventory contains a listing of several hundred such agreements and arrangements.[128] The index at the back of the volume alone contains some twelve pages for fiscal 1988-1989. Payments from the federal government in the amount of $32.5 billion plus tax points were made to the provinces, territories and municipalities pursuant to these agreements.

It should be pointed out that many of these agreements lack the degree of free negotiation, insofar as provincial input is concerned, that is normally available to parties to a negotiation. Many are more in the nature of unilateral agreements in which the federal government dictates the terms.

In any case, the use of intergovernmental agreements can be considered to be a legitimate alternative to formal constitutional amendments provided two criteria are recognized and respected. First, that all parties to an agreement have at least a modicum of constitutional power to enter into such agreements in the first place. From the federal side, this is not a particular problem where the agreement calls for the expenditure of federal funds because the federal government can rely on its assumed spending power in any area of activity. For the provinces, it is not so easy. It could be argued that provinces do not have the constitutional power to enter into agreements with the federal government on subjects such as, say, national defence, external affairs, or any other activity that is exclusively within federal jurisdiction. Even in these areas, however, the parties might get away with entering into such agreements simply because no one is likely to challenge the agreements' validity (although, with the rules of status for the court having been substantially broadened by decisions of the Supreme Court of Canada in the 1970's, it may well be that a disgruntled taxpayer might attempt to have such an agreement declared invalid.)

The second criterion that must be respected if intergovernmental agreements are to be used as an alternative for constitutional amendments is, that whatever agreements are offered by the federal government to one province, ought to be available to them all. This does not mean that all provinces will take up the offer or that even the circumstances which exist in every province are such that a proposed agreement would prove to be particularly attractive to all the others. But at least the offer must be extended to all governments.

On this latter point, a brief historical glimpse may be instructive. After three and a half years of concentrated efforts to amend the Constitution between 1968 and 1971, including seven First Ministers' Conferences, approximately fifty Ministerial Meetings and an untold number of meetings of officials, the Victoria Charter round foundered because of Quebec's rejection of the package. The reason given by Quebec for its refusal was that the package did not give to Quebec any additional constitutional authority in the area of social policy. Interestingly enough, a few months after the unsuccessful conclusion of the Victoria Charter round, the federal government entered into an arrangement with the Province of Quebec on certain aspects of social policy largely giving to that province what it wished to obtain had the Constitution been amended.[129] In my view this is an improper use of intergovernmental agreements. They should not be used to give indirectly that which is not achievable through direct means particularly if the benefit is extended to only one province.

It is to be hoped that the recently concluded agreement between the federal government and Quebec on the subject of immigration does not fall into that category. The circumstances seem strikingly similar to the aftermath of the Victoria Charter. Again, it will be recalled that one of the provisions of the Meech Lake Accord would have permitted the federal government to enter into an agreement with the province of Quebec on immigration issues.

Although the Meech Lake Accord failed nonetheless a new immigration agreement has subsequently been entered upon between the federal government and the Quebec government.

Indications are that, under the new agreement, which came into force on April 1, 1991, Quebec will gain the following:

- exclusive responsibility for the selection of independent immigrants;
- authority and compensation for immigrant settlement services, including language training and cultural integration;
- compensation for some of the responsibilities held by Ottawa transferring from the federal government to Quebec $332 million in financial compensation over a four-year period;
- assurances that "best efforts" will be made to see to it that Quebec will receive 25% (Quebec's population share) of all immigrants coming to Can-

ada with an option to exceed that number by 5%, to compensate for several years of a declining birth rate.

The difficulty with this kind of an agreement is the adverse impact it has on the other provinces within in Canada.

Although an immigration agreement with Quebec is said to be necessary to preserve the cultural and linguistic character of that province, this Accord seems to be more about economics. Quebec will receive 32% of all the settlement monies available from the federal government and yet, on the basis of experience to date, it receives only about 18% of the country's immigrants. Differential processing times for Quebec applicants, the allocation of a high proportion of independent immigrants to Quebec and the disproportionate share of federal settlement dollars to Quebec puts other provinces, such as British Columbia, at a decided disadvantage.

Given the very high percentage of immigrants to British Columbia who have English as a second language, arguably the settlement challenges facing British Columbia are just as significant as those facing Quebec. In 1989 immigration to Quebec was 33,706 compared to British Columbia with 24,978.

All provinces have to draw from the same sources of immigration, and the dollar pie from which the federal government has to fund all aspects of immigration is finite. To allow one province to take its cut, leaving the other provinces to share in the fragments that remain, is not a commendable use of intergovernmental agreements as an alternative to constitutional amendments.

E. Free Votes in our Parliamentary System

1. Introduction

The recent Maclean's/Decima Poll confirms what any concerned observer is well aware of and that is that "Canadians as a whole are suffering a massive loss of confidence in politicians and the political system itself." Increasingly Canadians are becoming more and more convinced that it is the *system* itself that is at fault and they are prepared "to accept fundamental changes in the make-up of the country — even to the point of instituting a radically new federal system, with or without Quebec".[130]

Frustration at not being able to influence the decisions of government, even through their elected representatives to Parliament, has turned to bitterness and anger and an attitude toward the old line political parties of "a plague on both your Houses".

Government has become so big, so monolithic, inflexible, executive-driven, and so passive in responding to the perceived needs of the citizens that the local Member of Parliament is seen to be largely irrelevant to the decision-making process. Instead of the Member of Parliament on the government side representing the views of his or her constituents in Ottawa, the Member quickly becomes an apologist for the actions of the government and becomes the representative of Ottawa to his or her constitutents. It matters not a great deal which party is in power as it is a fundamental structural matter that requires reform.

Unlike representative government (i.e., United States), responsible government (i.e., U.K., Canada, Australia) requires that at all times the executive government have the "confidence" of the majority of the members of the popularly elected House. This requirement to have majority support in order for a government to continue to govern, led many years ago to the establishment of the political party system.

The party system permits the formulation of public policy objectives and platforms which the public can identify as being attached to a particular party. It is this adherence to an established platform that provides the level of predictability necessary for governments to function with some degree of certainty and stability. This adherence to the party platform is known as "party solidarity".

Unfortunately in Canada in recent years, this concept has been rigidly enforced by the leadership of all the major federal parties far beyond what is necessary in a parliamentary system. It has, to all intents and purposes, rendered impotent the member of parliament in being an effective spokesperson of his or her constituents' needs where those needs happen to be at variance with party policy.

An increasing number of Canadians are puzzled why it is that when a majority of a member's constituents strongly support capital punishment or oppose the G.S.T., for example, that their elected representative nonetheless votes to the opposite effect.

There is absolutely no necessity in the proper operation of responsible government to require the degree of party discipline and solidarity that is presently imposed upon Canadian legislators at both levels of government. A recent study shows that in 1867, only 28% of Canadian backbenchers supported their government on every issue, the figure rose to 78% in 1963, and it is estimated to be in the upper 90% range for the present government.[13] Some years ago, Prime Minister Trudeau referred to opposition M.P.'s as "nobodies," but government backbenchers, given the force of party discipline, are rendered rather less than that.

For duly elected members of the House of Commons to be freed, to a greater degree, from the undue strictures of party discipline, would allow the elected member to gain more personal satisfaction from his job in being able to put forward his constituents' own views thus leading, presumably, to a greater degree of influence over government policy. If the operation of free votes resulted in proposed legislation of the government being defeated from time to time then, so be it. The country would be the better for the effective expression of the constituent viewpoint and influence that individual Members of Parliament could have on policy formulation and implementation.

In order to maintain the essentials of responsible government which calls for the government to have the ongoing support of the majority of the elected members, there would, of course, be some votes that would be considered to be confidence votes in the government. These would include votes on the reply to the Speech from the Throne, votes on the Budget and financial bills arising out of the Budget and a few other significant matters specifically declared to constitute a vote of confidence in the government.

In fairness, it should be mentioned that some procedural reforms in recent years in the House of Commons in Ottawa have been taken, designed to give the individual member a greater role. These include:

- questions addressed to Ministers;
- greater use of the committee system;
- allotted days for private members;
- examination of some government appointments;
- motions of adjournment to discuss matters of urgency.

F. Plebiscites, Referenda and Initiatives

An increasing number of Canadians are frustrated by the fact that the only time they can assert some control over their political leaders and institutions is on election day — once every four or five years. In between, many Canadians feel that they have no voice in the affairs of government and that, because of an undue adherence to party discipline as above described, even their Member of Parliament does not speak for them.

Increasingly in Canada, there is support in establishing and using techniques for "direct democracy" through which political power could be exercised directly by a majority of citizens. These could include plebiscites, referenda and initiatives.

A plebiscite may be defined as an expression of opinion by the electorate on a question put to them by government the outcome of which is not binding on government.

A referendum, while also set by government, may be binding in its result upon government in that it may require government to take certain actions.

An initiative, on the other hand, requires that if a popular petition for a proposed or existing law is initiated by a requisite number of electors, then the government is obliged to hold a popular vote on the issue and, if passed, the provision becomes law.

In British Columbia experience with the first of these categories, i.e., plebiscites, goes back as far as 1873. Since that time we have held seven province-wide plebiscites: four of them relating to liquor laws; one to MLA's salaries; one to daylight saving time; and, in 1916, one to do with women's sufferage.

During the 1990 session of the Legislature, the government introduced and the Legislature passed the *Referendum Act*. This represented a significant move toward a true referendum in that the legislation provides that the government that asks the question is bound by the answer and is required by law to initiate the necessary policy or legislative action to fulfil the wishes of the electorate. I believe this represents the first time in Canada that provincial legislation on referenda (as distinct from legislation on initiatives) binds the government of the day to implement the result.

The Provincial Secretary in speaking to the legislation at Second Reading stage stated:

> *"In the Canadian tradition, it represents an evolutionary step, not a revolutionary one. It respects our parliamentary tradition in retaining discretion over its use in the hands of elected representatives, but it provides a very powerful avenue for effective public expression, whenever that may be required to establish a province-wide concensus for change, to give government clear direction in dealing with unforeseen matters or to break a deadlock where strongly opposing views are creating a sort of paralysis . . ."* [132]

On the matter of initiatives, it is interesting to note that between 1913 and 1919 each of the four western provinces passed legislation providing a mechanism whereby a certain percentage of the electorate could initiate their own legislation and approve or reject laws passed by their respective legislatures. It appears the legislation was never invoked probably because in 1919 the Judicial Committee of the Privy Council ruled that since the Act in Manitoba permitted the creation of laws without Royal Assent, it infringed on the constitutional position of the office of the Lieutenant Governor.

The question outstanding is whether the government of British Columbia should now take the further step of introducing legislation to provide for initiatives. In effect, rewriting the 1919 legislation which was never proclaimed.

While there is much popular appeal to the concept of the public initiative, it is not without its disadvantages. Under our present system, governments are ultimately accountable for their legislative program, policies and spending. The use of public initiatives to some extent removes that accountability. Governments can say they are not responsible for this or that piece of legislation, for taxing authority or for spending priorities because their actions have been dictated by public initiatives. My preference would be to hold governments directly accountable for their actions.

Moreover, as experience in other jurisdictions show, the unfettered use of the initiative can lead to an unfocussed mish-mash of initiatives oftentimes working at cross purposes with one another and sometimes depending on Madison Avenue selling techniques for their success.

In summary, governments should be encouraged and indeed persuaded by their electorate to use the referendum process more and more on matters of crucial concern. Rather than embark upon the further step of the public initiative at this time, I would prefer to see how effective efforts are to lessen the rigidity of party solidarity, so as to make elected members more accountable to their electorate, and how effective is the process of referenda. Only if these fail should the alternative of the public initiative be considered.

G. Aboriginal Rights

Section 91 (24) of the *Constitution Act, 1867*, provides that "Indians, and lands reserved for Indians" are the exclusive jurisdictional responsibility of the Parliament of Canada. This has given rise to the administration of Indian affairs by the federal government, including the reserve system, and what has been described as a trust relationship between the Indian people and the Government of Canada. Although provinces do not have the constitutional power to legislate specifically on Indian matters, the Courts have held that laws of general application within the province apply to Indians and land reserved for Indians so long as they do not entrench upon legislation passed by the Parliament of Canada pursuant to its power under Section 91 (24).

Significant amendments to the Constitution on Indian matters were made at the time of patriation and subsequently. At patriation, in 1981, "the existing aboriginal and treaty rights of the aboriginal peoples of Canada" were "recognized and affirmed". "Aboriginal peoples of Canada" were defined to include the Indian, Inuit and Metis peoples of Canada. This represented a significant broadening of the definition of "Indians" covered by Section 91 (24). This amendment did not define aboriginal rights but it did recognize and affirm whatever aboriginal rights were then existing.

The 1981 amendment also provided that a First Ministers' Conference be convened within one year, to which representatives of the aboriginal peoples would be invited, in an attempt to identify and define the nature of aboriginal rights.

The Conference was held. Indeed, no less than four First Ministers' Conferences were held over a 5-year period in attempt to define aboriginal rights and, more particularly, to consider whether aboriginal self-government should be added to the Constitution. In addition to the four First Ministers' Conferences, many meetings at the ministerial and official's level were held over the period. In the end, no agreement was reached on a precise formulation to be added to the Constitution on the subject of aboriginal self-government or on the numerous other issues which the aboriginal representatives brought to the negotiating table.

However, a significant amendment was agreed to which was added to the Constitution and came into force on July 11, 1984. That amendment extended the meaning of "treaty rights" to include rights contained in land claim agreements, present or future. This means that land claim settlements are recognized and affirmed by the Constitution. It may be argued, that this means the terms of such settlements have the force and effect of the Constitution.

What about the future? Few would argue that the existing laws and the relationship between the Indian peoples and the federal and other governments leave a good deal to be desired. A comprehensive overhaul is needed. In spite of billions of dollars having been spent by governments over the years to ostensibly meet the needs of the aboriginal peoples, the fact remains that, in many instances at least, the Indian peoples remain at a distinct disadvantage in terms of economic opportunities and their social condition.

Governments and the Indian peoples working together are going to have to devise a better way. In my view, there has been an undue preoccupation to discuss legal and constitutional concepts which have largely led nowhere and left unresolved "the underlying social and economic problems which have disadvantaged Indian peoples from the earliest times."[133]

I am not convinced that there are some magic words that can be placed in the Constitution that will effectively address these outstanding issues. In the first place, the needs of the native people vary from province to province or province to territory and even from band to band within a province. Broad sweeping words inserted within the Constitution of Canada would mean little.

The better prospect seems to be for governments to be engaged in negotiations with the native peoples at the band level in order to achieve agreements to provide the kind of economic opportunities, local government and improved social conditions, tailored to meet particular needs, that most native peoples seek. Agreements so reached could then, if they included land claim settlements *where appropriate*, would have the benefit of the protection provided by the 1984 amendment to the Constitution referred to above.

The comments of the Chief Justice of British Columbia, at the conclusion of his judgment in the case of **Delgamuukw vs. The Crown**, are instructive:

> *"The parties have concentrated for too long on legal and constitutional questions such as ownership, sovereignty, and "rights," which are fascinating legal concepts. Important as these questions are, answers to legal questions will not solve the underlying social and economic problems which have disadvantaged Indian peoples from the earliest times.*
>
> *Indians have had many opportunities to join mainstream Canadian economic and social life. Some Indians do not wish to join, but many cannot. They are sometimes criticized for remaining Indian, and some of them in turn have become highly critical of the non-Indian community.*
>
> *This increasingly cacophonous dialogue about legal rights and social wrongs has created a positional attitude with many exaggerated allegations and arguments, and a serious lack of reality. Surely it must*

be obvious that there have been failings on both sides. The Indians have remained dependent for too long. Even a national annual payment of billions of dollars on Indian problems, which undoubtedly ameliorates some hardship, will not likely break this debilitating cycle of dependence.

It is my conclusion, reached upon a consideration of the evidence which is not conveniently available to many, that the difficulties facing the Indian populations of the territory, and probably throughout Canada, will not be solved in the context of legal rights. Legal proceedings have been useful in raising awareness levels about a serious national problem. New initiatives, which may extend for years or generations, and directed at reducing and eliminating the social and economic disadvantages of Indians are now required. It must always be remembered, however, that it is for elected officials, not judges, to establish priorities for the amelioration of disadvantaged members of society." [134]

V. The Process of Constitutional Reform

A. Introduction

Perhaps the greatest lesson to be learned from the Meech Lake debacle is that constitutional reform will not be achieved through a process that:

- is exclusively conducted through private meetings of First Ministers;
- is conducted within a time frame unilaterally imposed by one of the parties;
- does not have a major degree of major public input at an early stage, and
- results in amendments that do not bear the support of a majority of the Canadian people.

No change to the constitutional amending formula that was agreed to in November 1981, and which became part of the Constitution by the Queen's Proclamation the following April, is necessary. (A full review of the importance of the amending formula is set out at length in Chapter IIC of this Paper.)

The requirements of the amending formula need to be looked upon as the *final* step of a number of steps that would be taken in order to achieve an amendment. The additional steps, to which I will refer, are not now contained in the Constitution, but may be built into the "front end" of the amending process without any necessity of them being actually formalized into the Constitution. I suggest that the process by which amendments are made to the Constitution in the future should involve the following six steps:

B. A Six Stage Process

1. Initial Public Soundings

Most of the senior governments in Canada are now engaged in a variety of processes to seek their public's view as a stepping-stone to the formulation of their government's policy on the Constitution. The Government of Canada has its Citizens' Forum. There is a Special Joint Committee of the Senate and House of Commons which is studying the amending formula and the constiutional reform process. No less than ten Deputy Minister task forces are at work within the federal government to review a wide range of programs with a view to, among other things, possible decentralization. In addition, the Prime Minister has made several major speeches lately focussing on the consequences for Quebecers of ultimately making a choice between some kind of "renewed federalism" and outright independence. A formal federal policy position on the Constitution is likely to emerge before the end of 1991.

In Alberta, the Cabinet/Government Caucus Task Force, established last August, has been transformed into a Special Select Legislative Committee on Constitutional Reform involving all political parties. Public hearings in eight centres are expected to be held by the end of June, but late July or early August seems more likely. A government discussion paper has been issued to focus discussions.

In Saskatchewan, the Justice Minister has indicated that a public consultation process will be announced soon.

In Manitoba, a legislative task force held public hearings from January 31 through February 9. Further hearings are likely.

In Ontario, the Interim Report of the Select Committee on Ontario in Confederation has recently been published outlining general themes emerging from public hearings before the Committee.

In Quebec, the Allaire Committee Report, first issued in January, has been confirmed in almost all particulars at the Liberal Convention held in Montreal on March 8th and 9th. The Belanger Campeau Commission Report recommends a referendum on Quebec sovereignty be held in June or October 1992 unless formal "offers" are received from the rest of Canada by that date.

In Nova Scotia, the Premier is expected to soon appoint a formal commission. In New Brunswick, a public commission is examining constitutional options. In Newfoundland, Premier Wells has issued a statement calling for a constitutional convention and a national referendum.

In British Columbia, several significant initiatives have been undertaken. The Cabinet Committee on Confederation was restruck in late December 1990. It has extended an invitation to a number of British Columbians to express their views in writing on the future of the country with proposals for reform and has agreed to publish those papers. In addition, the Government took a major step in shaping the future process for constitutional reform in this province by introducing into the Legislature the **Constitutional Amendment Approval Bill**. This Bill, which has now passed the House, imposes a statutory requirement to hold a referendum among all British Columbians prior to the Province agreeing to any amendments being made to the Constitution of Canada.

This means that no resolution proposing to amend the Constitution of Canada can be passed by the B.C. Legislature unless the provision is first approved by referendum. In addition to this, I expect that the public consultation process in British Columbia will be enlarged to include an invitation to all British Columbians to express their views about the constitutional future of Canada and our province. The Knowledge Network is being invited to take a leading role to further public discussion. Finally, this paper to be distributed in the public domain, and others, is designed to focus attention on the issues and stimulate discussion thus assisting the province in developing a policy position on constitutional reform.

Besides these governmental initiatives, numerous private sector organizations, universities throughout the country, research institutes and others, are in the process of sponsoring conferences on Canada's constitutional future.

I call this the initial public sounding stage: each government in Canada, in its own way, raising the awareness level of its citizens to the issues and their implications. It also provides governments with an opportunity to listen to the views and concerns of its citizens. It matters not a great deal that the mechanisms used to achieve this initial dialogue differs from province to province so long as the process is done fully and openly.

2. Developing a Provincial Position

In this Province, the Cabinet Committee on Confederation will then need to take the primary leadership in developing a policy position on the Constitution for the province. It, of course, can rely on the public input which will be forthcoming from the processes described above, i.e. peoples views, discussion papers, speakers forums, proposals forthcoming from other jurisdictions and the expertise and experience that resides within government itself.

However, in my view, in order to develop a provincial position that fairly and fully takes into account the interests of all British Columbians, it would be advisable for the Cabinet Committee to also seek input from a Legislative Committee, comprising members from both sides of the House, which would be mandated to conduct a series of public meetings throughout the province. Chaired by a government member, the Committee could be commissioned to undertake and complete its task by the end of the summer. That report would then be made available to the Cabinet Committee as valuable input into the formulation of government policy on this issue. A full and complete government position could then be finalized and made public by the end of 1991.

In arriving at its position, the Cabinet Committee will wish to consult with other senior governments in Canada, to assess the directions which those governments propose to take, in the hope that the British Columbia position once it is formulated might attract a measure of support from other jurisdictions.

There is good reason for involving members of both sides of the House in formulating British Columbia's constitutional position. At this crucial time in our country's history, the subject matter transcends partisan political considerations and, moreover, because, in the final analysis, any constitutional package has to be approved by the Legislature, it is advisable to proceed throughout the process with as much non-partisan support as possible.

3. Forging Alliances

Although ultimately any constitutional package that is agreed to has to be passed by the Parliament of Canada and either seven or ten Legislatures, depending on the nature of the subject matter within the package, it is important to bear in mind that there is no constitutional requirement for a First Ministers' Conference to be held at any stage of the process. As a first step, there is nothing to stop bilateral discussions from taking place either between the federal government and one or more of the provinces. For that matter, there is nothing to stop a province itself from initiating discussions with other provinces. In this latter connection I would strongly recommend that British Columbia should seek to forge alliances with other provinces on a united constitutional position before it commences negotiations with the federal government. The other western Provinces are logical allies. In addition, some, but probably not all the elements of our constitutional package, would prove attractive to the Premier of Newfoundland and possibly one or other of the Maritime provinces.

While it would be wise to forge alliances with those having common interests, it would obviously be unwise to consider "watering down" our province's position to accommodate other proposals that may clearly not be sufficiently in our province's interests.

4. Federal-Provincial Negotiations

Ultimately federal-provincial negotiations will take place and at that time British Columbia should put on the table proposals which are in the best interests of the province within a united Canada and be prepared to resist proposals put forward by others which are not in the province's interests. While that approach may seem obvious, in the past this province has been too inclined to consider any agreement is better than no agreement. That will no longer do. In the next round of negotiations, all of the parties must have their proposals on the table, some perhaps diametrically opposite to one another, but, it will only be in the "give and take" of fair and full negotiations to follow, that an acceptable compromise to all can be achieved.

There have been those who have advocated that the negotiations ought not to be undertaken in the usual federal-provincial context but that a special constitutional convention should be established whereby delegates from each province, perhaps drawn from both sides of the Legislature, and similar delegates from the federal side, would be mandated by governments to undertake the negotiations and come up with a renewed Constitution. Another suggestion is that delegates should be elected at large. The weakness of this instrumentality is that, because it is not a part of the constitutional amending process now prescribed by the Constitution, the results of such a convention would not be binding on governments.

It is highly unlikely that at this stage eleven governments would agree to divest themselves of the right to negotiate constitutional reform to another forum — no matter how reputable or how chosen. That being so, it is almost inevitable that governments presented with a report of a constitutional convention of this kind would consider themselves entitled to make changes to the package to their liking. That might well have the effect of largely defeating the whole purpose of a constitutional convention. Moreover, it has been suggested that a constitutional convention "would throw our doors open to all sorts of intellectually ingenious schemes of theoretical possibility".[135]

If a constitutional convention was already a part of the formal process entrenched within the Constitution, then I would support it as the preferable vehicle to undertake negotiations between the parties. However, because that is not the case and because the possibility of all governments now agreeing to constitutionalize a constitutional convention is unlikely, I consider the, albeit difficult, federal-provincial negotiating process to be the appropriate forum.

Finally, it would be wise for the subjects for constitutional reform to be divided into two categories. One category would be those which require unanimity — a very small category hopefully — and another category of subject matters which could be amended by the seven province amending formula. By dividing the package into two in this way if, at the end of the day, seven but less than ten province approval was obtained, then the whole package would not be defeated. Only the part of the package that required ten province approval would be cast aside. The rest would become law.

5. Provincial Referendum

With the passage of the **Constitutional Amendment Approval Act** in the province in late March 1991, the fifth step in the constitutional reform process would be for any agreed-upon negotiated package of amendments to be put to the citizens of British Columbia in a referendum. This is the ultimate in participatory democracy in the constitutional reform process and is an accepted practice in several other federations, notably, Australia and Switzerland.

There would of course be a need for the government to undertake a fair and full communications plan to inform the public in some considerable detail as to the nature of the amendments contained within any proposed package to be put to a referendum.

6. The Ratification Process

As the last step in the constitutional reform process, it will be necessary for the Parliament of Canada and the Legislatures of seven provinces having 50% of the population, or all ten provinces, (depending on the subject matter of the amendments) to pass resolutions in favour of the proposed amendments. Once the requisite number of resolutions is passed, the Governor General issues a Proclamation bringing the amendments into force.

The amending formula provides that not more than three years shall pass from the passage of the first resolution in a legislature to the resolution of the last legislature. This should not prove to be a problem, as it was during the Meech Lake round, if the full measure of public input takes place that is proposed here and, if the opposition parties in the various legislatures are, at an early stage, involved in the process.

Summary of Conclusions and Recommendations

I. British Columbia in Confederation

No. 1

Natural forces (geography, economy, historical development, demography) have *made* British Columbia remote from the rest of the nation. Unfortunately, the present institutional framework at the centre of the country has *kept* us remote by not addressing our Provinces' particular and special policy needs. One of the secrets to a satisfied British Columbia within Confederation is to be found in restructuring the central institutions of the federation in such a way as to allow British Columbia a fuller and proper voice in the formulation of crucial national policies and federal-provincial issues.

II. C. The Amending Formula

No. 2

There is nothing wrong with the amending formula and British Columbia should resist all attempts to change it. At Patriation, for an attractive amending formula, British Columbia agreed to join others in exchanging the proven concept of Parliamentary supremacy for the dubious results of judicial review, embraced significant minority linguistic rights particularly in the area of education and put its own constitutional priorities on hold. For that high price, British Columbia should take the position that changes to the amending formula will not be now entertained.

II. D. Unfinished Constitutional Business

No. 3

Future efforts towards constitutional reform in which all Canadians and their governments are soon to be engaged must stand on their own merit. Never again should recriminations of past failures or alleged betrayals form the motivation for governments to address outstanding constitutional concerns.

III. B. The Canadian Senate

No. 4

The new Upper House should represent provincial interests *at large* and the most acceptable democratic way to do this is through Senators being popularly elected, as is the case in the United States and Australia.

No. 5

The election of Senators should take place in each province at the time the voters go to the polls to elect their provincial government.

No. 6

One half of a province's Senators should be elected at each provincial election.

No. 7

Each Senator should serve the equivalent of two terms of the government of the province from which he comes before having to seek re-election.

No. 8

I would propose Senate seats be distributed across Canada on the basis of representation, partially weighted by provincial population, on the following sliding scale:

Any province having a population under 1,500,000	6 seats
Any province having a population between 1,500,000 and 4,000,000	8 seats

Any province having a population over 4,000,000 10 seats

Under this formulation, with the addition of two Senators from each of the territories, the Senate would have 76 seats with provision for increase in membership as the population of provinces expand. The distribution of seats by Province and the population of those provinces would be as shown in the following Table:

Province	Population (000's)	Proposed Number of Senators	Number of Present Senators
Nfld.	573.0	6	6
P.E.I.	130.4	6	4
N.S.	891.6	6	10
N.B.	723.9	6	10
Que.	6,762.2	10	24
Ont.	9,731.2	10	24
Man.	1,089.9	6	6
Sask.	1,000.3	6	6
Alta.	2,469.8	8	6
B.C.	3,131.7	8	6
Yuk.	26.0	2	1
N.W.T.	54.0	2	1
Canada	26,584.0	76	104

No. 9

The Senate should continue to exercise the plenary powers which the Senate now has. It should not have the power to introduce money bills; it should not be able to obstruct amendments to the Constitution; and a vote against a government bill or other initiative in the Senate should not constitute a vote of non-confidence in the government.

No. 10

In most federations, there are techniques to reconcile any major differences that may arise between the two Houses. A similar technique should be adopted in Canada's case.

III. C. A Council of the Federation

No. 11

I propose the establishment in the Constitution of an institution to be known as The Council of the Federation. Such a body would be a permanent forum designed to broker crucial federal-provincial issues specifically set out in the Constitution, and whose deliberations would be the first step in the initiation of legislation or other federal government action on those issues. The Council would be comprised as described and exercise the functions and responsibilities set out below:

1. The Council would be a body consisting of ministerial representatives of the federal and each provincial government.
2. Appointees would act on the direct instructions of the government they represent in deliberations within the Council.
3. Each of the eleven governments would have one vote on each matter coming before the Council.

4. For a vote to carry it would have to have the support of the Federal government and any seven provinces which, in the aggregate, have 50% of the population of all of the provinces.
5. The Council would be a *ratifying* body whose approval would be necessary before federal legislation is initiated, or appointments are made, as the case may be, in the following specific areas of authority assigned to the Council:
   - (a) ratifying appointments proposed by the Federal government to the Supreme Court of Canada;
   - (b) ratifying appointments proposed by the Federal government to major federal agencies and federal commissions;
   - (c) approving the proposed enactment of federal laws to be administered by the Provinces;
   - (d) approving the proposed use of the spending power of Parliament in areas of Provincial jurisdiction;
   - (e) approving the proposed use of Parliament's declaratory power;
   - (f) approving, in advance the intention of the Federal government to enter into treaties in subject areas falling within provincial jurisdiction, the provinces, with that approval thereby agreeing to their implementation;
   - (g) ratifying the use of the emergency power, except in times of war;
   - (h) being informed of the proposed enactment of legislation at both levels which, by the Constitution, is expressly said to be within concurrent jurisdiction.

III. D. The Division of Powers

No. 12 There are three general principles which are essential and serve as starting points for any review of the distribution of powers. These are:

a. The need to strike an appropriate balance between *factors of unity* and *factors of diversity* in Canadian national life;
b. Benefit sharing;
c. Efficiency.

No. 13 To base the demand for future constitutional arrangements in Canada on the concept of two "founding nations", and thus leading to special status for Quebec, is to follow a model that many would argue —

- (a) rests on a dubious historical base;
- (b) has less and less meaning to more and more Canadians;
- (c) ignores the protections already provided to Quebec in the present constitutional and non-constitutional arrangements; and,
- (d) is unnecessary to support Quebec's (and other provinces') demands for more powers.

No. 14 It is my view that the existing constitutional arrangements, including those enacted in 1981, have proved fully adequate to protect and indeed to promote the French language primarily, but not exclusively, in Quebec and in the nation's capital. One has to seriously question the validity of any claim for still more special status for

Quebec based on the argument that the French language and culture lacks protection.

No. 15 Although *massive* decentralization of powers would not be in the best interests of Canada's survival as a nation and may well prove to be unattractive to several of the Provinces, this does not rule out *some* significant degree of decentralization of powers to the Provinces.

No. 16 The technique of delegating legislative powers from one level of government to another, without the necessity of a formal amendment to the Constitution, should be explored further, including a provision that the delegated power would not be withdrawn unless a reasonably lengthy period of notice were first given.

No. 17 In the current impasse between the need to have juridical equality among the provinces, on the one hand, and yet the need to allow those provinces that wish to do so to exercise greater legislative powers, the key may be found *in concurrency with provincial paramountcy.*

No. 18 The Council of the Federation, should ensure that, in the areas of concurrency, duplication of government effort is minimized.

No. 19 More precise language should be used in assigning legislative powers. General terms such as "Property and Civil Rights", "Matters of a Local and Private Nature" and "Regulation of Trade and Commerce" are so broad and susceptible of any number of interpretations as to be unhelpful in indicating clearly to either level of government what is the scope and limits of their constitutional power. If the subject matters were divided into their component parts, rather than using all embracing language, exclusive powers could be assigned more often to one or other level of government and thus avoid the duplication and inefficiency problems that concurrency can cause.

No. 20 I do not address in an exhaustive way in this paper those powers which the Province of British Columbia may wish to have transferred to it either fully or by way of concurrent jurisdiction. These are matters to be decided at a later date in the context of federal-provincial constitutional negotiations, although the Province should be working on this at the staff level now. Traditionally the province has sought more constitutional jurisdiction over communications, offshore resources, immigration, environment, fisheries, elements of family law and taxing powers (but particularly tax room).

No. 21 It is reported that committees of Deputy Ministers at the federal level have been established to identify areas of jurisdictional overlap and duplication. The mandate should be enlarged to identify subject matters that might be transferred by constitutional amendment to the provinces. The process should be restructured to include representation from the provinces and, depending on the subject-matter under review, appropriate interests from the private sector. Advice should also be sought from members of the academic community, research institutes and others. With such an assessment in hand, governments and the people of Canada would then be able to base their decisions, at least on division of powers issues, on an informed and rational basis.

III. E. The Supreme Court of Canada

No. 22 Being the ultimate arbiter of federal-provincial disputes and in all other respects the interpreter of the Constitution, including the Charter of Rights, it is inconceivable in a federation that this Court should remain the creation of federal legislation. It should be constitutionalized.

No. 23 The Supreme Court of Canada should continue to be the final appellate court on all criminal, civil and constitutional matters.

No. 24 The existing jurisdiction of the court should be amended to allow a province to refer directly to the Supreme Court of Canada a significant constitutional issue for the Court's opinion.

No. 25 The Supreme Court of Canada Act should be amended by deleting the provision relating to the requirement that 3 Judges be from the Bar of Quebec.

No. 26 The membership of the Supreme Court of Canada should be increased to ten.

No. 27 The make-up of the Court at all times should be represented by appointments drawn from all five regions of Canada, the Atlantic region, Quebec, Ontario, the Prairie region and British Columbia.

No. 28 The appointment of judges to the Supreme Court of Canada should be ratified by the Council of the Federation. The federal government would put forward the nominee and all provinces, through their representation on the Council, would have a genuine role in the appointment process.

III. F. Federal Boards and Commissions

No. 29 Because regional needs differ from Province to Province, it is essential that Federal Boards and Commissions are comprised of directors who are drawn from all parts of the country (on a fair and equitable basis) and who bring to bear in the decision making process the particular needs and concerns of the region from which they come.

No. 30 The Council of the Federation should have a hand in the appointment process of directors to major federal boards and commissions in the expectation that, over time, a fairer and more equitable distribution of representation from throughout the country would result.

Regionalism and the Bank of Canada

No. 31 The following improvements to the Bank of Canada are proposed:

1. First and foremost, the Directors of the Bank should be knowledgeable, strong and articulate voices. They should be recognized from within the regions of the country from which they come as leaders in the areas of expertise directly related to the central bank's mandate.
2. Although all the directors could continue to be appointed by the federal government, those appointments would require ratification from the Council of the Federation.

3. Directors should be encouraged to bring to the deliberations of the Board the considered views of the region from which they come. To assist them in this regard, they ought to be given a substantial independent research capability tailored to measure regional monetary policy needs.
4. The *Bank of Canada Act* should be amended to make it plain that the Board of Directors are to have a more active role in policy formation — a reform proposed by the Porter Royal Commission on Banking and Finance in 1964 but never implemented.
5. The Governor of the Bank of Canada should be required to make an annual presentation to the Council of the Federation.

IV. Non-Constitutional Reforms

No. 32 Moves toward more decentralization of governmental activity need not wait for, nor are they dependent upon, constitutional reform. Governments should show leadership now by pulling back from initiating new programs, dismantle existing programs which overlap with similar programs in the other jurisdiction, and abolishing programs that have outlived their usefulness or are less than essential.

No. 33 The Government of Canada should freeze government programme expenditures at the 1990/91 level for a period of three years in order to assist in getting the deficit under control.

IV. B. The National Debt and Deficit

No. 34 The federal government should act on the recommendations of the Nielsen Task Force in a systematic and comprehensive way. It should set up a process to require both the line ministries and the central agencies in the Government to "show cause" why the full recommendations of the Nielson Report should not be implemented. Following that, an orderly system of implementation and monitoring should take place.

To the extent that the program areas are federal-provincial in scope, or impact upon provincial programs, the federal government should show leadership by extending the exercise to include the provincial governments so that program rationalization in these areas can take place.

No. 35 A prudent and orderly sale of a substantial portion of some of the underutilized assets of the Government of Canada over a five-year period could produce a substantial sum of money which then ought to be applied to reducing the national debt.

IV. C. Federal-Provincial Fiscal Arrangements

No. 36 It is essential that the two levels of government work closely together to harmonize their tax policies to ensure that there is sufficient "tax room" for each level of government in shared areas of taxation.

With the increased tendency of the federal government to pay less and less towards shared cost programs in health, post secondary education and social welfare, the need for both levels of government to agree to an appropriate tax share has never been more necessary.

No. 37 The Council of the Federation would be the forum in which shared-cost issues and other aspects of fiscal federalism could be systematically addressed.

No. 38 The recommendations of the provincial Minister of Finance in his paper, *Renewing Canada's Dangerous Fiscal Situation through Renewed Federalism and Fiscal Discipline*, should be acted upon.

IV. D. Intergovernmental Agreements

No. 39 The use of intergovernmental agreements can be considered to be a legitimate alternative to formal constitutional amendments provided two criteria are recognized and respected. First, that all parties to an agreement have at least a modicum of constitutional power to enter into the agreement in the first place; whatever agreements are offered by the federal government to one province, ought to be available to them all.

IV. E. Free Votes in our Parliamentary System

No. 40 There is absolutely no necessity in the proper operation of responsible government to require the degree of party discipline and solidarity that is presently imposed upon Canadian legislators at both levels of government.

IV. F. Plebiscites, Referenda and Initiatives

No. 41 Governments should be encouraged and indeed persuaded by their electorate to use the referendum process more and more on matters of crucial concern.

No. 42 Rather than embark upon the further step of the public initiative, I would prefer to see how effective efforts are to lessen the rigidity of party solidarity so as to make elected members more accountable to their electorate and how effective is the process of referenda. Only if these fail should the alternative of the public initiative be considered.

IV. G. Aboriginal Rights

No. 43 I am not convinced that there are some magic words than can be placed in the Constitution that will effectively address aboriginal issues. The better prospect seems to be for governments to be engaged in negotiations with the native peoples at the band level in order to achieve agreements to provide the kind of economic opportunities, local government and improved social conditions, tailored to meet particular needs, that most native peoples seek. Agreements so reached could then, if they include land claim settlements *where appropriate*, have the benefit of the protection provided by the 1984 amendment to the Constitution.

V. The Process of Constitutional Reform

No. 44 The requirements of the amending formula need to be looked upon as the *final* step in a number of steps that should be taken in order to achieve an amendment. The additional steps may be built into the "front end" of the amending process without any necessity of them being actually formalized into the Constitution. I suggest that the process by which amendments are made to the Constitution in the future should involve the following six steps:

— initial public soundings;

— developing a provincial position;

— forging alliances;

— federal-provincial negotiations;

— provincial referendum;

— the ratification process.

No. 45 The Cabinet Committee on Confederation will need to take the primary leadership in developing a policy position on the Constitution for the province.

No. 46 In order to develop a provincial position that fairly and fully takes into account the interests of all British Columbians, it would be advisable for the Cabinet Committee to also seek input from a Legislative Committee, comprising members of both sides of the House, which would be mandated to conduct a series of public meetings throughout the province. Chaired by a government member, the Committee could be commissioned to undertake and complete its task by the end of the summer. That report would then be made available to the Cabinet Committee as valuable input into the formulation of government policy on this issue.

No. 47 I would strongly recommend that British Columbia should seek to forge alliances with other provinces on a united constitutional position before it commences negotiations with the federal government.

No. 48 If a constitutional convention was already a part of the formal process entrenched within the Constitution, it might be the preferable vehicle to undertake negotiations between the parties. However, because that is not the case and because the possibility of all governments now agreeing to constitutionalize a constitutional convention is unlikely, I consider the, albeit difficult, federal-provincial negotiating process to be the appropriate forum.

No. 49 In the negotiations between the federal and provincial governments, it would be wise for the subjects for constitutional reform to be divided into two categories. Those which might require unanimity — a very small category hopefully — and those which could be amended by the seven province amending formula.

No. 50 For the provincial referendum, there will be a need for the Government of British Columbia to undertake a fair and full communications plan to inform the public in some detail as to the nature of the amendments contained within any proposed package to be put to them.

Epilogue

These proposals, taken as an integrated whole, represent my best efforts to put forward a model for a more balanced and renewed federalism.

There will be those who will say that these proposals do not go far enough to meet the present demands of the Province of Quebec. I would respond to such a reaction by making two points:

First, although it may not be apparent on the surface, these proposals, if accepted, would result in a major shift of power at the national level. The reforms to the central institutions of the federation would see the interests of the regions far more fully represented in national decision-making. In addition, through the establishment of the Council of the Federation, the governments of the provinces would have a substantial say in specific federal policy areas in which they can legitimately claim to be entitled to have a place. As to the division of powers, the substantial reforms proposed would greatly enhance the powers of those provinces who wish to avail themselves of additional powers. But, although decentralist in emphasis, these proposals would not impair the necessary operation of the federal government because "the centre" would, in one sense, be stronger through regional inputs. The dynamics of the federation would be significantly improved.

Secondly, thus far, in my view a genuine federalist position has not been forthcoming from the Province of Quebec. The Allaire Report purports to deal with matters of substance; the Belanger-Campeau Report, matters of process. In both cases, they leave much to be desired even as a basis for negotiation with the rest of the partners in the federation.

Of the Allaire Report, Jeffrey Simpson of The Globe and Mail says it best:

> *"The Allaire Report is poor political science and bad economics, but it is superior myth-making and, as such, strikes a resonant cord in large elements of the Quebec Liberal Party.*
>
> *At the level of common sense and intellectual rigour, the Report is a shockingly weak piece of work. It would leave the federal government looking like a political Cheshire Cat: Nothing would remain but the smile."* [136]

The Belanger-Campeau Commission report wants Quebec to pass a law committing itself to a referendum by October 1992, on the issue of Quebec's secession from Canada. The only way that the rest of Canada can forestall such a referendum would be to make a "binding" offer of a new constitutional partnership that Quebecers found acceptable. And yet, Premier Bourassa was recently quoted as saying:

> *"I don't see how we can accept today a solution to Quebec's constitutional problems that would come from outside the province."* [137]

What delightful ambiguity! You must make us an offer but we cannot accept it.

What a pale shadow are the proposals of the Quebec Liberal Party of 1991 compared to those of the Quebec Liberal Party of 1980: the Beige Paper of 1980, so comprehensive in scope and analysis and so cognizant of the interests of the other constituent parts of the Canadian federation.

And yet, in the eleven year interval and, notwithstanding the failure of Meech Lake, no significant day-to-day events have taken place that has placed Quebec at a serious disadvantage to its other partners in the Federation. In fact, I would argue that the language provisions contained in the patriation package, the provisions of the amending formula to protect Quebec's (and other provinces') essential interests and the accommodations which the

Government of Canada have made to Quebec over the 11 year period, all combine to show a rather favourable period of Quebec- Canada relations. Certainly nothing that has been done warrants the Quebec Liberal Party jettisoning its federalist proposals of 1980 in favour of its sovereigntist proposals of 1991. The fact is that the federalist forces in Quebec have, by and large, yet to be heard from, unless they be contained in the dissenting opinions of Mr. André Ouellet and Mr. Richard B. Holden of the Belanger-Campeau Commission.

Is there a collective will within Quebec to be part of a renewed Canada that has any reasonable semblance of a federal system? If there is, and if a federalist position is forthcoming from the Province of Quebec, then, when British Columbia and other governments put forward their proposals for the renewal of the Federation, *all* will share in the negotiations to shape the kind of new Canada that all Canadians committed to federalism can embrace.

Endnotes

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[1] Jeffrey Simpson, "Just when you think things can't get any worse, they can get worse," *Globe and Mail*, Jun 29, 1990, p. A 16.

[2] Carol Goar, "Stripping illusions in wake of Meech collapse," *Times-Colonist, Victoria*, July, 1990, p. A 5.

[3] Lise Bissonnette, quoted in "Editors note fundamental contradictions in Allaire report," by John Yorston, *Montreal Gazette*, February 5, 1991.

[4] Ted Byfield, "The real Canadian revolution which the media haven't seen," *B.C. Report*, July 9, 1990, p. 52.

[5] All of the statistics in this part are from B.C. Stats, Ministry of Finance and Corporate Relations, Government of British Columbia.

[6] Opening Statement of Premier Vander Zalm to First Ministers Conference, Vancouver, November 20-21, 1986.

[7] R. M. Burns, *One Country or Two?*, McGill — Queen's University Press, Kingston, 1971, Chap. ref., "British Columbia and the Canadian Federation," pp. 267-268.

[8] Arguably, Prime Minister John Turner might be considered to qualify as a British Columbian because of his years at U.B.C. and family roots here. However, it was not until the election in which his government was defeated that he held a seat in the Commons from this Province.

[9] Richard J. Van Loon and Michael S. Whittington, *The Canadian Political System: Environment, Structure and Process*, 2d ed., McGraw-Hill Ryerson, Toronto, 1976, Table 13-2, p. 317.

[10] Donald Smiley, *Canada and the New Constitution: Central Institutions*, Vol. 1, The Institute for Research on Public Policy, Beck & Bernier, 1983, p. 36.

[11] Peter McCormick, Ernest C. Manning and Gordon Gibson, *Regional Representation*, Canada West Foundation, September, 1981, pp. 29-31.

[12] It is reported that David Kilgour, M.P. (Edmonton Southeast) and Alex Kindy, M.P. (Calgary Northeast) were ejected from the Alberta Tory Caucus, secretly in March, 1990 and from the National Tory Caucus one month later.

[13] "Turner backs PM on Gulf War stance," *Globe and Mail*, January 17, 1991, p. A 4.

[14] By contrast board members from Quebec and Ontario were absent from only 2.

[15] Caroline Andrew and Rejean Pelletier, *The Regulators*, G. Bruce Doern, ed. "The Regulatory Process in Canada," MacMillan, Toronto, 1978, pp. 155-157.

[16] Cicero.

[17] This compares favourably with the U.S. experience over twice the time frame.

[18] For example:

1. "Ottawa studies breaking logjams on Constitution with referendum," *Toronto Star*, November 23, 1990, p. A 6.
2. "One thing is very clear. The (existing) process doesn't work," *Ottawa Citizen*, January 15, 1990, p. 6.
3. "Be prepared for sovereignty key minister advises Quebec," *Toronto Star*, November 14, 1990, p. A 11.
4. See also the Federal Government discussion paper: *Amending the Constitution of Canada*, December, 1990.

[19] On February 27, 1978 the Cabinet committee comprised:
Hon. K. Rafe Mair, Chairman
Hon. Garde Gardom
Hon. James Chabot
Hon. Allan Williams
Hon. Jim Nielson

[20] The academic advisory group initially comprised:
Dr. R.M. Burns, Public Administration, U.Vic.
Dr. Neil Swainson, Political Science, U.Vic.
Prof. R. Cheffins, Law, U.Vic.
Dean Ken Lysyk, Law, U.B.C.
Dr. Ron Shearer, Economics, U.B.C.
Dr. Alan Cairns, Political Science, U.B.C.

[21] The writer was appointed Deputy Minister (Constitutional Affairs) in the Premier's Office on October 31, 1977.

[22] The British Columbia Constitutional Proposals were published in September 1978 and comprised nine papers:
Towards a Revised Constitution for Canada
British Columbia: Canada's Pacific Region
Reform of the Canadian Senate
Reform of the Supreme Court of Canada
Improved Instruments for Federal-Provincial Relations
The Question of a Bill of Rights
Language Rights and the Constitution
The Distribution of Powers
The Amending Formula

Some of the substance of these proposals has been incorporated, where appropriate, into this Paper.

[23] The term "centripetal federalism" was first put forward publicly by the Hon. K. Rafe Mair, then Chairman, Cabinet committee on Confederation, in a speech to the Harvard Canadian Club at Harvard University, November 30, 1978.

[24] Letter from Prime Minister Trudeau to Premier Bennett, dated November 20, 1978.

[25] Verbatim Transcript on Senate Reform, First Minister's Conference on the Constitution, October, 1978, Ottawa.

[26] Keith Spicer, "Senate idea would make Federal system more balanced," *Montreal Gazette*, February 15, 1979.

[27] On several occasions during that period provincial officials met with Hon. Jean Luc Pepin of the Pepin/Robarts Commission and his officials; Mr. Claude Ryan of the Quebec Liberal Party and Mr. G. LaForrest, author of the Canadian Bar Association Report.

[28] Premier Bennett shared in this effort addressing the Montreal Board of Trade on May 12, 1980.

[29] Verbatim Transcript, First Minister's Conference, Ottawa, September 13, 1980.

[30] A speech, given by the writer condemning the unilateral federal action was reproduced, in the *Vancouver Province*, October 23, 1980, p. 5.

[31] The B.C., submission is set out in full in the *First Report from the Foreign Affairs Committee*, Vol. 2, U.K. House of Commons, 1980-81, pp. 186-223.

[32] Submission of Province of British Columbia to the Special Joint Committee on the Constitution of Canada, Ottawa, January 9, 1981.

[33] This initiative was largely the result of the efforts of Hon. G. Gardom, Q.C., Minister of Intergovernmental Relations, British Columbia.

[34] *First Report from the Foreign Affairs Committee*, Supra.

[35] For a full analysis of the Supreme Court of Canada's decision see: Institute of Intergovernmental Relations, *The Court and the Constitution: an analysis of the Supreme Court of Canada's Decision* (Queen's University, 1982).

[36] Section 59 of the *Constitution Act*, 1982 so provides.

[37] It is difficult to contemplate that the transfer of powers from the federal to provincial level will very often occur in respect to *any* subject matter.

[38] Alan C. Cairns, *And No One Cheered: The Politics of Constitutional Conservatism*, Methuen Publications, 1983, p. 52.

[39] Reference to the Court of Appeal of Quebec concerning the Constitution of Canada, [1982] 2 R.C.S. 793.

[40] An argument can be made that the Meech Lake provisions relating to the Supreme Court of Canada also required unanimity. Inasmuch as the present composition of the Supreme Court would not have been altered by Meech, I would argue that the 7 and 50 rule applied.

[41] The Resolution was agreed to at a First Ministers' Conference on March 16, 1983. The B.C. Legislature passed the Resolution on October 21, 1983. The actual amendment came into force on July 11, 1984; 16 months from the date the agreement was reached.

[42] Ted Byfield, "A constitution by conspiracy — who'd have thought it possible?" *British Columbia Report*, June 25, 1990, p. 52.

[43] Melvin H. Smith, "Still way to go — that's B.C.'s view," *The Province, Vancouver*, April 18, 1982, p. B 2.

[44] Carol Goar, *Times-Colonist*, Supra.

[45] Hon. Gordon Robertson, "What future for Canada," After Meech Lake Conference, Saskatoon, November 3, 1990.

[46] Robert A. Mackay, *The Unreformed Senate of Canada*, McClelland and Stewart, Toronto, 1963.

[47] In his book, *The Canadian Senate — A Lobby From Within*, Macmillan, 1978, pp. 19-24, Colin Campbell sets out a fairly impressive list of Committee activity by the Senate over the years particularly in the area of social policy.

[48] Robert A. Mackay, Supra, p. 113.

[49] Peter C. Newman, quoted by Colin Campbell, Supra, pp. 9-10.

[50] Colin Campbell, Supra, p. 10.

[51] Those businessmen were:
F.H. Dietrich
H.B. Elworthy
E.M. Gunderson
W.C. Mearnes
J.A. Wallace

[52] Hon. W.A.C. Bennett, Brief in Support of the Incorporation of the Bank of British Columbia, Queen's Printer, July, 1964.

[53] Hon. R.W. Bonner, Statement in Support of the Bank of British Columbia, Queen's Printer, July, 1964.

[54] In a personal conversation with the writer.

[55] Colin Campbell, Supra, p. 12.

[56] Ministry of Supply and Services, Government of Canada, *Royal Commission on the Economic Union and Development Prospects for Canada*, Vol. 3, p. 6.

[57] Ibid., p. 7.

[58] Peter McCormick, Ernest C. Manning and Gordon Gibson, *supra*. Foreword.

[59] For a complete analysis of whether the Australian Senate represents the regions, see Donald Smiley, *An Elected Senate for Canada?: Clues from the Australian Experience*, Institute of Intergovernmental Relations, Queen's University, Paper No. 21, 1985.

[60] *British Columbia Constitutional Reform Proposals*, Vol. 3, "Reform of the Canadian Senate," (1978).

[61] The Fathers may have seen the need for much intergovernmental activity unnecessary for another reason. Some of them viewed the role of the provinces to be subservient to the central government and subject to its supervision. Cooperation among equals was not in the cards.

[62] *Labour Convention Case*, 1937 A.C. 326, p. 354.

[63] For a full description of the "Better Terms" Movement in B.C., see the *M.A. Thesis* of Harold P. Johns, University of British Columbia, April 1935.

[64] Isabella D. Horry and Michael A. Walker, *Government Spending Facts*, The Fraser Institute, Vancouver, 1991.

[65] For a full account of the development of federal-provincial conferences, see *Confrontation and Collaboration — Intergovernmental Relations in Canada Today*, Richard Simeon, editor, The Institute of Public Administration of Canada, 1979.

[66] Gordon Gibson, Brief to the Task Force on Canadian Unity, January 1978, p. 21.

[67] Federal-Provincial Conference of First Ministers on the Economy, Summary of Conclusions, November 29, 1978.

[68] Institute of Intergovernmental Relations in Canada, Sheilagh Dunn, Editor, *The Year in Review 1982: Intergovernmental Relations in Canada*, P. 2.

[69] Ibid. pp. 2-3.

[70] Ibid. p. 10.

[71] Royal Commission on the Economic Union, Supra, p. 21.

[72] See, for example, Ronald Watts, "*The Federative Superstructure*," a paper prepared for the Business Council on National Issues, Toronto, January 16, 1991, p. 24.

[73] Royal Commission on the Economic Union, Supra, p. 88.

[74] Government of Canada, *Federal-Provincial Grants and the Spending Power of Parliament*, (Ottawa, 1969), Queen's Printer.

[75] Melvin H. Smith, Supra.

[76] "Sex, Politics and Dreams," *Maclean's Magazine*, January 7, 1991, p. 34.

[77] Edwin R. Black, *Divided Loyalties*, McGill-Queen's University Press, 1975, pp. 15-19.

[78] Donald Creighton, *Canada's First Century, 1867 — 1967*, Macmillan, Toronto, 1970, pp. 11-12.

[79] Peter McCormick, Ernest C. Manning and Gordon Gibson, Supra, p. 13.

[80] Donald V. Smiley, *Canada in Question: Federalism in the Eighties*, McGraw-Hill Ryerson Limited, Toronto, 1980, p. 296.

[81] Thomas J. Courchene and John N. McDougall, *The Context for Future Constitutional Options*, a paper prepared for the Business Council on National Issues, Toronto, January 1991, pp. 10-11.

[82] Donald V. Smiley, *Canada and the New Constitution: Central Institutions*, Supra, p. 73.

[83] Ibid., p. 74.

[84] Jeffrey Simpson, "The rebuttals made to those in Quebec who insist French is in decline," *Globe and Mail*, April 2, 1991, p. A 18.

[85] Northrop Frye, Speech to the Social Sciences and Humanities Research Council of Canada reproduced in "Northrop Frye's Canada," *Globe and Mail*, April 15, 1991, p. A 17.

[86] Peter M. Leslie, "Options for the Future of Canada" *The Good, the Bad and the Fantastic*, a paper prepared for the Business Council on National Issues, Toronto, January 16, 1991.

[87] Opening Statement of the Province of British Columbia, Constitutional Conference, Ottawa, February 10-12, 1969.

[88] David K. Elton, "One Prairie Province," *Lethbridge Herald*, Alberta, 1970.

[89] Governments of Nova Scotia, New Brunswick and Prince Edward Island, *Maritime Union Study*, (1970).

[90] "Wells urges talks on Merging," *Globe and Mail*, January 7, 1991, p. A 3.

[91] *The Amendment of the Constitution of Canada*, Queen's Printer, (Ottawa, 1965).

[92] David Milne, "Equality or Asymmetry: Why Choose?" A paper prepared for the Business Council on National Issues, Toronto, January 16, 1991, p. 27.

[93] Donald V. Smiley, *Canada and the New Constitution: Central Institutions*, Supra p. 75.

[94] Robert Sheppard, "Big brother isn't so big any more," *Globe and Mail*, March 6, 1991, p. A 19.

[95] Peter H. Russell, editor, *Leading Constitutional Decisions*, 3d ed., Ottawa: Carlton Library Series, 1982, p. 21, Introduction.

[96] W.R. Lederman, *The Confederation Challenged: Thoughts on Reform of the Supreme Court of Canada*, in Ontario Advisory Committee on Confederation, background papers and reports: Vol. 2, Toronto: Queen's Printer, 1970, pp. 307-308.

[97] Supreme Court of Canada, Minister of Supply and Services *1988-89 Annual Report*, (Canada, 1989).

[98] Carol Goar, *Times-Colonist*, Supra.

[99] The thesis that regulation does in fact lead to a more efficient utilisation of resources is a proposition much debated in recent writing on this subject.

[100] Premier's Office, (Intergovernmental Relations) *An Analysis of B.C. Representation on Major Federal Crown Corporations and Boards*, FY 1988-89, (January, 1990).

[101] Donald V. Smiley, *Canada and the New Constitution: Central Institutions*, Supra, p. 51.

[102] *An Analysis of B.C. Representation on Major Federal Crown Corporations and Boards*, Supra.

[103] Speech of Prime Minister Mulroney, Buckingham, Quebec, December 16, 1990.

[104] Economist Douglas Peters quoted in "Decentralizing the Central Bank," *Globe and Mail*, March 25, 1991, p. B 1.

[105] Report of the Royal Commission on Banking and Finance, Ottawa, 1964, pp. 545-546.

[106] Government of Canada, *$136 Million Commitment to Eliminate Family Violence*, (February 20, 1991).

[107] "Your Morning Smile," *Globe and Mail*, February 27, 1991, p. A 1.

[108] According to a publication published by the Provincial Ministry of Finance, "*Towards a Solution: Refinancing Confederation*," August 1990.

[109] All of these statistics are taken from *Towards a Solution: Refinancing Confederation*, Ibid.

[110] Ibid.

[111] See the article"Spending increases decried," *Globe and Mail*, February 27, 1991, p. B 1.

[112] First Report of the Western Premiers' Task Force on Constitutional Trends, May 1977, Queen's Printer, Victoria.

[113] Letter from Premier Bennett to Prime Minister Trudeau, May 5, 1977.

[114] Government of Canada, Introduction to the Process of Program Review, *Task Force on Programme Review*, (Ottawa, March, 1986).

[115] Ibid., p. 19.

[116] Ibid., p. 20.

[117] Ibid., p. 23.

[118] Ibid., p. 24.

[119] Ibid., p. 25.

[120] Ibid., p. 26.

[121] Ibid., p. 29.

[122] Ibid., p. 37.

[123] In his autobiography, *The House is Not a Home*, MacMillan of Canada, Toronto, 1989, p. 230, Mr. Nielsen believes "many of our suggestions will come to pass when the political climate is right".

[124] According to a research study released on March 28, 1991, by the Belanger-Campeau Commission.

[125] "Debt rising at $58,000 every minute," *Globe and Mail*, March 21, 1991, p. A 6.

[126] Ministry of Finance and Corporate Relations, Provincial Government, Victoria.

[127] Ministry of Finance and Corporation Relations, Provincial Government, Victoria.

[128] Supply and Services, *Federal-Provincial Programs and Activities: A Descriptive Inventory*, (Ottawa, 1988-89).

[129] Donald V. Smiley, *Canada and the New Constitution: Central Institutions*, Supra, p. 79.

[130] Robert Marshall, "A Shaken Nation Bares its Anger," *Maclean's Magazine*, January 7, 1991, p. 10.

[131] "Giving the Caucus Clout," *Policy Options*, December, 1990, p. 32.

[132] Hon. Howard Dirks, Provincial Secretary, British Columbia Debates, July 24, 1990, p. 11394.

[133] *Delgamuukw vs. The Queen*, Comments following the Reasons for Judgement of Chief Justice Allan McEachern.

[134] Ibid.

[135] Hon. Gordon Robertson, "What Future for Canada?" Supra, p. 12.

[136] Jeffrey Simpson, "How Friendly a reception will Quebec's Liberals give the Allaire Report?" *Globe and Mail*, March 8, 1981, p. A 14.

[137] "Quebec sticks with boycott on constitutional efforts," *Times-Colonist, Victoria*, April 19, 1991, p. B 8.

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